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# **Towards a Suitable Domestic Arbitration Practice in Nigeria**

**By Ademola Jonathan Bamgbose**

**A thesis submitted in partial fulfilment of the requirements for the  
Degree of Doctor of Philosophy in Law**

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## **DEDICATION**

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### **DECLARATION**

I declare that this thesis is my original work. I confirm that the thesis has not been submitted for another degree at the University of Warwick or any other university.

**Ademola Jonathan Bamgbose**

**June 2016.**

## **ABSTRACT**

The Nigerian judicial system is currently in a state of distress. Not only has the judiciary been trailed by allegations of corruption, incompetence and god-fatherism amongst others, the wheels of justice in Nigeria are slowly grinding to a near halt. This is because of the large and growing case list of courts as well as the recurrent industrial strike actions embarked upon by court staff. As a solution to this crisis, stakeholders have put forward a number of suggestions, one of which is the use of alternative dispute resolution methods like domestic arbitration, as a solution to the problems of the judiciary and as a viable alternative to the court system.

As we will however come to see in this thesis, Nigeria's Arbitration and Conciliation Act 1988 ("Arbitration Act"), which is based on the UNCITRAL Model Law 1985, is not only outdated, it is also for many reasons not suitable and relevant to a developing country as Nigeria.

For example, the existing Arbitration Act fails to take the legal and social idiosyncrasies of the Nigerian nation into consideration. Furthermore, the Act fails to incorporate the pre-existing and judicially recognized customary arbitration practice into the Act. In addition, the Nigerian Arbitration framework contains a number of anti-arbitration provisions, which have clearly inhibited the growth of domestic arbitration in Nigeria. Moreover, between 1988 and now, a number of beneficial changes have occurred within the sphere of arbitration and from which the Nigerian arbitration framework can draw lessons. All these among others, make the Nigerian Arbitration Act an unsuitable alternative to the court system in Nigeria.

This thesis therefore recommends a bespoke domestic arbitration framework, which takes account of the legal and social idiosyncrasies of the Nigerian nation as well as recent but relevant domestic arbitration practices in similar jurisdictions as Nigeria. Among other recommendations, the proposed framework borrows a leaf from the deeply rooted and judicially recognised customary arbitration practice in Nigeria. Furthermore, in a bid to identify and incorporate relevant provisions and practices that have emerged within the sphere of domestic arbitration between 1988 and now, we undertake a comparative analysis of the Ghanaian Alternative Dispute Resolution Act 2010, the UNCITRAL Model Law 2006, the English Arbitration Act 1996 as well as the Uniform Act on Arbitration 1999 of OHADA.

It is believed that this modern but tailored framework will encourage the use of domestic arbitration in Nigeria and by extension ameliorate the problems in the judicial system.

## **LIST OF ABBREVIATIONS**

ADR	Alternative Dispute Resolution
AMCON	Asset Management Corporation of Nigeria
CCJA	Common Court of Justice and Arbitration
CISG	Convention on Contracts For the International Sales of Good
CJN	Chief Justice of Nigeria
COA	Court of Appeal
DAC	Domestic Arbitration Court
EFCC	Economic and Financial Crimes Commission
FACA	Federal Arbitration and Conciliation Act
FCT	Federal Capital Territory
FHC	Federal High Court
IAMAR	International Arbitration and Mediators Australia Rules
ICC	International Chamber of Commerce
JSC	Judicial Service Commission
JUSUN	Judiciary Staff Union of Nigeria
LCA	Lagos Court of Arbitration
LCIA	London Court of International Arbitration

LSAL	Lagos State Arbitration Law
NAC	National Arbitration Centre
NACCIMA	Nigerian Association of Chambers of Commerce, Industries, Mines and Agriculture
NASME	Nigerian Association of Small and Medium Enterprises
NBA	Nigerian Bar Association
NIAL	Nigerian Institute of Advanced Legal Studies
NIC	National Industrial Court
NJC	National Judicial Council
NJI	National Judicial Institute
OHADA	Organisation pour l’Harmonisation en Afrique du Droit de Affaires
PDAA	Proposed Domestic Arbitration Act
SC	Supreme Court of Nigeria
SIAC	Singapore International Arbitration Centre
UNCITRAL	United Nations Commission on International Trade Law
UNICEF	United Nations Children Fund
USAC	Uniform State Arbitration and Conciliation

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## CHAPTER ONE

### INTRODUCTION

#### 1.0 BACKGROUND

The Nigerian judicial system is currently in a state of distress. Indeed, calls for urgent intervention must be heeded if complete breakdown is to be avoided.<sup>1</sup> The crisis within the system has been catalysed by the series of allegations and unfortunate incidents involving the judiciary both at the Federal and State levels.<sup>2</sup> As we will come to see in Chapter Two of this thesis, there has been an increase in allegations and cases of corruption and dereliction of duty levelled against members of the judiciary.<sup>3</sup> In fact, a number of Judges have been known to live far above their means.<sup>4</sup>

Nigerian Judges have also been accused of giving controversial and very absurd decisions.<sup>5</sup> Court cases in Nigeria have been known to last well over thirty years.<sup>6</sup> These has resulted in a significant loss of confidence in the effectiveness of the judicial system.<sup>7</sup> The situation has been further compounded by the delays often encountered in the resolution of domestic disputes in Nigerian courts. The former Chief Justice of

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<sup>1</sup> We discuss this in more detail in Section 3.0 of Chapter Two.

<sup>2</sup> Douglas Anele, 'Criticisms and Growth of Democracy in Nigeria' *The Vanguard* (16 June 2013) <[www.vanguardngr.com/2013/06/criticism-and-the-growth-of-democracy-in-nigeria-3/](http://www.vanguardngr.com/2013/06/criticism-and-the-growth-of-democracy-in-nigeria-3/)> accessed 5 April 2014.

<sup>3</sup> Tobi Soniyi, 'NJC Retires Justice Olotu, Inyang for Gross Misconduct' *Thisday* (6 March 2014) <[www.thisdaylive.com/articles/njc-retires-justices-olotu-inyang-for-gross-misconduct/172577/](http://www.thisdaylive.com/articles/njc-retires-justices-olotu-inyang-for-gross-misconduct/172577/)> accessed 5 April 2014.

<sup>4</sup> Kunle Olasanmi, 'Corruption: Justice Olotu, 2 Others Still Under Investigation - EFCC' *Leadership* (6 July 2014) <<http://leadership.ng/news/377040/corruption-justice-olotu-2-others-still-investigation-efcc>> accessed 25 May 2016.

<sup>5</sup> A recent case is that of the former governor of Delta State, James Ibori who was discharged and acquitted under questionable circumstance in Nigeria. However, when a similar charge was instituted in the United Kingdom, he was found guilty of fraud totalling over fifty million pounds and was sentenced to thirteen years in prison. See Editorial 'Former Nigeria governor James Ibori jailed for 13 years' *BBC News* (17 April 2012) <[www.bbc.co.uk/news/world-africa-17739388](http://www.bbc.co.uk/news/world-africa-17739388)> accessed 19 January 2016.

<sup>6</sup> Only recently, Nigeria was awash with news of the Supreme Court of Nigeria's judgement on an oil spillage dispute involving Shell Petroleum Development Company, a proceeding spanning thirty-two (32) years. See Editorial, 'Court orders Shell to pay 30 million' *Punch* (6 June 2015) <<http://www.punchng.com/news/oil-spill-32-years-after-scourt-orders-shell-to-pay-n30m-compensation/>> accessed 6 June 2015.

<sup>7</sup> As we will come to see in Chapter Two, there has been a rise in incidences of jungle justices (that is, citizens seizing suspected criminals and setting them ablaze right on the street). It is believed that if these criminals are handed over to the authorities, they are able to evade justice either in connivance with the police or by virtue of a corrupt and incompetent judiciary.

the Federation, Dahiru Musdapher in a speech delivered at the *Nigerian Institute of Advanced Legal Studies Fellows Lectures Series*, submitted that even if litigants were stopped from commencing appeals at the Supreme Court, it will still take the apex court many years to clear the existing backlog.<sup>8</sup> The former President of the Commonwealth Lawyers Association, Mrs Boma Ozobia, also opined that even if all panels of the Court of Appeal in Nigeria were made to sit every day of the week (including Saturdays and Sundays) for the next seven years, they would still not be able to conclude all currently pending appeals before the Court.<sup>9</sup>

As we will see in Chapter Two, there is no doubt an urgent need for reforms within the Nigerian judiciary. In recognition of these problems, the immediate past President of the Federal Republic of Nigeria, Dr Goodluck Jonathan, recently charged the judiciary to as a matter of urgency come up with a solution to these problems. He cited the growing disapproval of the judiciary by Nigerian citizens as justification.<sup>10</sup>

Without prejudice to current efforts being taken by the Nigerian government and judiciary,<sup>11</sup> it is high time stakeholders explore and encourage the use of alternative (to litigation) but viable methods of resolving disputes as a solution to the crisis within the judiciary. Further to this, my PhD thesis suggests domestic arbitration as a suitable solution to the many problems of the Nigerian court system, as well as an effective and viable alternative to the litigation practice in Nigeria.<sup>12</sup>

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<sup>8</sup>D.Musdapher, 'The Nigerian Judiciary: Towards Reform of the Bastion of Constitutional Democracy' (Fellows' Lectures Series, Nigerian Institute of Advanced Legal Studies, Lagos, 2011).

<sup>9</sup> Innocent Anaba, 'CJN, CJ can address problems of Court by Practice Directions' *Vanguard* (January 10, 2013) <<http://www.vanguardngr.com/2013/01/cjn-cjs-can-address-problems-of-courts-by-practice-directions-boma-ozobia/>> accessed 5 April 2014.

<sup>10</sup> Omosile Ola, 'Jonathan Reaffirms Commitment to Judicial Reform' *Metropole* (20 November 2014) <<http://www.metropole.ng/index.php/promo/item/3077-jonathan-reaffirms-commitment-to-judicial-reforms>> accessed 3 June 2016.

<sup>11</sup> We examine some of these efforts in Section 4.0 of Chapter Two of this thesis.

<sup>12</sup> Domestic Arbitration is fast becoming a popular method of resolving disputes in many jurisdictions. According to Redfern and Hunter, many countries 'have modernised their laws so as to be seen to be 'arbitration friendly'; firms of lawyers and accountants have established dedicated groups of arbitration specialists...' See: Nigel Blackaby et al, *Redfern and Hunter on International Arbitration* (5<sup>th</sup> ed, OUP 2009) 1.

## 2.0 STATEMENT OF THE PROBLEM

In the course of this thesis, we will see that Nigeria lacks a suitable domestic arbitration framework. This is notwithstanding the existence of the Nigerian Arbitration and Conciliation Act ("the Act"),<sup>13</sup> which has been in existence for well over twenty-eight years.<sup>14</sup> Nigerian lawmakers in their wisdom have chosen to model the Nigerian Act after the UNCITRAL Model Law 1985,<sup>15</sup> a model which is said to have been put into place to administer international commercial disputes.<sup>16</sup>

Baron de Montesquieu has rightly argued that every law "should be adapted in such a manner to the people for whom they are framed, that it should be a great chance if those of one nation suit another...It should be in relation to the nature and principles of each government...They should have relation to the degree of liberty which the Constitution will bear; to the religion of the inhabitants, to their inclination, riches, number, commerce, manners and custom...It should be in relation to the climate of each country, to the quality of its soil, to its situation and extent."<sup>17</sup> Unfortunately this is not the situation in Nigeria. Rather than adapt the UNCITRAL Model Law to the Nigerian situation, the said Model Law was wholly adopted in Nigeria.

As we will come to see in this thesis, the legal and economic situation in Nigeria clearly does not support a total adoption of the UNCITRAL Model Law. Ironically, a more developed country like the United Kingdom found a total adoption of the Model Law to be unsuitable and instead tailored it and developed a bespoke arbitration law, in line with her needs, practices and pre-existing law.<sup>18</sup>

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<sup>13</sup> Chapter A18 of the Laws of the Federation of Nigeria 2004.

<sup>14</sup> The Act came into operation in 1988. As we would come to see in Chapter Four of this thesis, by virtue of the change in government from Military to Civilian rule in 1999, Section 315 of the 1999 Constitution converted pre-existing Decrees of the Military government to Acts of the National Assembly. In other words, the Arbitration and Conciliation Decree 1988 is what is now known as the Arbitration and Conciliation Act 2004. For the purposes of this thesis and in general arbitration practice in Nigeria, the 1988 and 2004 framework is one and the same.

<sup>15</sup> A revised edition was introduced in 2006.

<sup>16</sup> UNCITRAL Model law 1985, article 1(1); See also James O'Rodner, 'International and National Arbitration: A Fading Distinction' (2002) 19(5) *Journal of International Arbitration* 491,492.

<sup>17</sup> Charles De Secondant and Baron de Montesquieu, *The Spirit of the laws* (Thomas Nugent Trans. J.V. Prichard rev) 7 1914.

<sup>18</sup> We examine this in Section 3.1 of Chapter Six of this thesis.

Furthermore, the Act fails to take into consideration the legal and social idiosyncrasies of the Nigerian nation. For example, the Act fails to incorporate the pre-existing and judicially recognized customary arbitration practice into the Act. In fact, going by the implication of several provisions in the Act, it is virtually impossible for the customary arbitration practice to operate within the framework of the Act.<sup>19</sup> As we will come to see in the course of this thesis, Ghana a country with a similar colonial and legal history as Nigeria, in a bid to tackle problems similar to the ones plaguing the Nigerian judiciary, incorporated her customary arbitration practice into the recently enacted Ghanaian Alternative Dispute Resolution Act 2010.<sup>20</sup>

In addition, the Nigerian Arbitration framework contains a number of anti-arbitration provisions, which arguably inhibit the growth of domestic arbitration in Nigeria and which should be removed. For example, *Section 2 of the Nigerian Act* gives courts wide and unlimited power to revoke arbitration agreements without parties' consent. Furthermore, *Section 5 of the same Act* grants courts the discretion to decide whether or not to grant an order of stay of proceedings even in the face of a validly made arbitration agreement. These two provisions are clearly antithetical to arbitration.

Between the year 1988 (which is when the existing Nigerian Arbitration and Conciliation Act was introduced) and now, a number of beneficial changes have occurred within the sphere of arbitration and from which the Nigerian arbitration framework can draw lessons. For example, the English Arbitration Act 1996 allows parties to consolidate arbitrations with similar issues.<sup>21</sup> The Revised Model Law 2006 also redefines an arbitration agreement in a way that accommodates oral agreements.<sup>22</sup> Furthermore, the Uniform Act on Arbitration 1999<sup>23</sup> also imposes a time

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<sup>19</sup> Arbitration and Conciliation Act 2004, sections 1&57.

<sup>20</sup> See Section 1.0.1 of Chapter Six of this thesis.

<sup>21</sup> English Arbitration Act 1996, section 35.

<sup>22</sup> See the Revised Model Law 2006, article 7.

<sup>23</sup> Uniform Act on Arbitration 1999, article 12.

limit of six months on arbitrations conducted within the Organisation pour l'Harmonisation en Afrique du Droit de Affaires (OHADA) region.<sup>24</sup>

All these among others, have made the Nigerian Arbitration and Conciliation Act an unsuitable alternative to the litigation practice in Nigeria, thus increasing the pressure on the courts as well as emphasizing the other problems of the Nigerian court system. In addition to efforts being made by the government to revamp the judiciary therefore, it is necessary for stakeholders to revisit the said Nigerian Arbitration Act.

### **3.0 OBJECTIVES OF THE RESEARCH**

The major objective of this study is to come up with a bespoke domestic arbitration framework, which takes into consideration the peculiarities of the Nigerian nation and relevant aspects of the pre-existing arbitration frameworks in Nigeria, as well as any recent but applicable changes that have occurred within the sphere of arbitration between now and when the Nigerian Act was originally introduced in 1988.

In order to develop a suitable domestic arbitration framework for Nigeria, it is necessary to start by examining the existing arbitration frameworks in Nigeria by way of a background. This allows us to critically assess the situation on ground as well as justify our call for arbitration reforms. We will therefore examine the existing but very old Arbitration and Conciliation Act in Nigeria as well as the home grown arbitration practice in Nigeria called customary arbitration. In recommending a model framework, efforts will be made towards incorporating the case law on the existing home grown customary arbitration practice into our eventual recommendation.

In recommending a suitable domestic arbitration framework for Nigeria, it is submitted that the frameworks of other countries with established, more developed and relevant arbitration practices, would also prove to be a useful guide. Specifically,

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<sup>24</sup> OHADA was conceived in 1993 to encourage the development of commercial relations as well as encourage legal certainty through the unification of business laws in Africa. Despite the fact that the treaty opens up its membership to the whole of Africa, only seventeen African countries, all of which are former French colonies, have signed on to the treaty. We discuss this in detail in Section 4.0 of Chapter Six of this thesis.

we will consider the Ghanaian Alternative Dispute Resolution Act 2010, the revised version of the UNCITRAL Model Law introduced in 2006, the English Arbitration Act 1996 as well as the Uniform Act on Arbitration 1999 of the OHADA region.

#### **4.0 RESEARCH QUESTIONS**

This research work will generate and seek to answer the following questions:

1. How suitable is the Nigerian Arbitration and Conciliation Act 2004 in the resolution of domestic disputes in Nigeria?
2. What improvements can be made to the existing Arbitration Act in Nigeria, in order to make it more effective and functional in the resolution of domestic disputes?

#### **5.0 THESIS STRUCTURE**

Chapter Two discusses the problems of the Nigerian judicial system in a bit of depth and very importantly provides a basis for this thesis. For example, we highlight the problems of delay in the administration of justice and perennial backlog of cases, long and very regular industrial strike actions, a largely incompetent and corrupt judiciary, bad and antiquated laws as well as poor court infrastructure amongst others.

We conclude this chapter by making a few suggestions, all in a bid to improve the effectiveness of the Nigerian judicial system. For example, we advocate for the financial autonomy of the judiciary, a more transparent appointment process of Judges, improved and continuous training for new and old Judges. Very important especially to this thesis is the fact that we recommend arbitration as a solution to many of the problems of the judiciary and as a viable alternative to litigation.

In Chapter Three, we introduce the reader to basic concepts and principles of arbitration, most of which would be useful in the course of this thesis. We also establish the viability of the arbitration mechanism as against popular dispute resolution mechanisms like mediation, conciliation and negotiation, which are classified under the umbrella head of Alternative Dispute Resolution (ADR).

We discuss the inability of the courts to adapt to the evolving commercial realities as well as justify our selection of arbitration as a viable alternative to litigation and as a solution to some of the problems plaguing the Nigerian judicial system. We conclude Chapter Three by introducing the reader to the existing domestic arbitration practices in Nigeria: the Nigerian Arbitration Act and the customary arbitration practice.

Chapter Four takes our discussion a step further by introducing the reader to the domestic arbitration practice in Nigeria. Specifically, we argue that contrary to popular opinion, domestic arbitration is not necessarily limited to purely national or domestic matters. We opine that not only is the idea of domestic arbitration many times dependent on an understanding of international arbitration, knowledge of domestic arbitration is also a relevant aspect of the practice of international arbitration. Furthermore, we critically analyse the domestic arbitration practice in Nigeria with the aid of case law and statutory provisions as embedded in the Arbitration Act.

The aforementioned analysis is significant as it provides an insight into the domestic arbitration framework in Nigeria, accentuates the gaps in the said framework as well as justifies our call for reforms in the light of the Nigerian situation. In addition, it provides a framework by which Nigeria's domestic arbitration practice can be compared with the customary arbitration method as well as other more developed but relevant arbitration frameworks, thus highlighting any significant developments that have occurred within the sphere of arbitration between 1988 and date.

We also critically examine a report by a committee set up by the Federal Government of Nigeria for the reform and harmonization of arbitration and ADR laws in Nigeria. Drawing from discussions and conclusions made in the course of this chapter, we conclude Chapter Four by making a case for reforms.

Chapter Five examines the existing customary arbitration practice through the eyes of the court, which unlike its Ghanaian counterpart, is unable to operate under the existing arbitration statute. Specifically, we examine arguments surrounding the existence and validity of the practice in Nigeria. This chapter critically examines the



Nigerian Supreme Court's decision in *Agu v Ikewibe*,<sup>25</sup> a locus classicus on customary arbitration in Nigeria, as well as address arguments arising from this decision.

In addition, we critically analyse recent decisions of the Nigerian Supreme Court on customary arbitration in the light of general principles of arbitration. We would at the conclusion of this analysis submit that customary arbitration has in the last two decades systematically evolved from a quasi-arbitration practice to a full arbitration practice. We conclude this chapter by making a case for reforms.

In Chapter Six, we examine the domestic arbitration framework in jurisdictions with more developed but relevant arbitration frameworks. This is in a bid to learn from the successes and failures of these more developed frameworks. Specifically, we consider the Ghanaian Alternative Dispute Resolution Act 2010, the revised UNCITRAL Model Law 2006, the English Arbitration Act 1996 as well as the Uniform Act on Arbitration 1999 of the OHADA region. This analysis also provides a useful insight into developments that have occurred between 1988 and now, and from which the proposed arbitration framework can pick a thing or two.

Chapter Seven closes this thesis. Drawing from arguments and conclusions made in previous chapters, we among other recommendations, advocate for a bespoke domestic arbitration practice for Nigeria. In arriving at the model framework, we in some instances advocate for a total repeal of existing statutory provisions. In some other situations, we advocate for more flexible provisions and procedures, in line with the level of development in Nigeria. In other instances, we introduce new structures or institutions in order to aid the development of the domestic arbitration practice in Nigeria. We also in some other cases borrow a leaf from the customary arbitration practice in Nigeria. In many places, we recommend new processes and structures independent of all the frameworks which we consider.

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<sup>25</sup> (1991) 3 NWLR PT 180.

The result of all these is a specially tailored arbitration law that takes into consideration both the legal and social idiosyncrasies of the Nigerian nation as well as established and proven arbitration principles as practised in other jurisdictions.

## CHAPTER TWO

### **THE JUDICIAL SYSTEM IN NIGERIA: THE NEED FOR AN ALTERNATIVE**

#### INTRODUCTION

Over the past few years, the performance and reputation of the Nigerian judiciary has come under intense scrutiny and criticism. Not only has the judiciary been trailed by allegations of corruption, the courts at various levels have been unable to decide cases at the same speed at which they are being instituted. This has resulted in a backlog that dates as far back as three decades.<sup>1</sup> In addition, the Nigerian judiciary continues to suffer from periodic and very lengthy industrial strike actions, which have not only contributed to the already existing backlog, but more importantly denied citizens of their constitutional right of access to the courts.<sup>2</sup>

Furthermore, the laws governing the jurisdiction of many of the superior courts in Nigeria have been enmeshed in a lot of controversy. This has resulted in conflicting and very questionable decisions, thus complicating an already bad situation. As we will in the course of this thesis come to see, the inefficiency of the Nigerian judiciary has led to dissatisfaction among the Nigerian citizenry, which in many instances has encouraged the total breakdown of law and order.<sup>3</sup> As at the time of writing this chapter of the thesis, the Nigerian judicial system is in a state of crisis.

Jim O' Neill, the BRICS proponent, recently identified Nigeria as one of the next economic giants.<sup>4</sup> Following the recent rebasing of her economy, Francisco Ferreira, the Chief Economist (African Region) of the World Bank, has speculated that the next couple of years will witness an unprecedented increase in investment activities in

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<sup>1</sup> Osita Ogbu, 'The Judiciary in a Polity: A force for Stability or Instability?: The Nigerian Experience' (1999) 11 *African Journal of International and Comparative Law* 724, 735.

<sup>2</sup> As at the time of writing this part of the thesis in March 2015, the various Superior Courts in Nigeria had been on strike for periods ranging between five months and eight months.

<sup>3</sup> BBC editorial, 'Nigeria's vigilante 'jungle justice' *BBC News* (28 April 2009) <<http://news.bbc.co.uk/1/hi/world/africa/8021468.stm>> accessed 20 November 2015.

<sup>4</sup> According to this Economist, the other giants include Mexico, Indonesia and Turkey, hence the popular acronym MINTS. 'The Mint countries: Next economic giants?' *BBC News* (6 Jan 2014) <[www.bbc.co.uk/news/magazine-25548060](http://www.bbc.co.uk/news/magazine-25548060)> accessed 20 March 2015.

Nigeria.<sup>5</sup> This will of course result in a plethora of specialised and technical disputes,<sup>6</sup> thus emphasizing the need for an efficient dispute resolution system.<sup>7</sup> In view of the existing and very many problems of the Nigerian judiciary, one is forced to question her physical and technical capacity to accommodate this new and varied workload.

This chapter discusses the problems of the Nigerian judicial system in depth and very importantly, serves as one of the basis for this PhD thesis. In this chapter, we justify the need to devise a new and bespoke means of resolving domestic disputes in Nigeria, and so while we highlight as well as critically discuss some of the major problems of the Nigerian court system (like the heavy workload of the courts, the recurrent industrial strike actions, incompetent and/or corrupt staff, among many others), among other recommendations, we conclude this chapter by suggesting arbitration as a solution to the aforementioned problems and as a viable and practical alternative to the existing litigation practice in Nigeria.

In terms of structure, this chapter is divided into three major parts. By way of background to the existing judicial system, Part One highlights and examines very briefly, the pre-colonial mechanisms of resolving disputes in traditional Nigeria; the traditional court system, customary arbitration as well as the customary mediation and reconciliation mechanisms. By these, we establish that prior to colonization, the geographical location now known as Nigeria had its own local methods of resolving domestic disputes.<sup>8</sup> Unfortunately, these mechanisms which arguably have the capacity to take off some of the burden from the courts, have gradually faded into oblivion mainly because of their lack of recognition by Nigerian law.<sup>9</sup>

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<sup>5</sup> Ndubuisi Francis, 'W'Bank: Rebased GDP Has Exposed Nigeria to Global Businesses' *Thisday Live* (13 April 2014) <[www.thisdaylive.com/articles/wbank-rebased-gdp-has-exposed-nigeria-to-global-investors/176037/](http://www.thisdaylive.com/articles/wbank-rebased-gdp-has-exposed-nigeria-to-global-investors/176037/)> accessed 20 March 2015.

<sup>6</sup> B.A. Bukar, 'Legal Framework for the Resolution of International Commercial Disputes: An examination of Nigeria's Arbitration Laws' (1999) 16(1) *Journal of International Arbitration* 47, 48.

<sup>7</sup> Koyinsola Ajayi, 'Nigeria's New Arbitral and Conciliatory Process' (1989) 7(9) *International Banking Law* 140.

<sup>8</sup> This discussion and distinction will also be useful when we discuss the customary arbitration practice in Nigeria in Chapter Five of this thesis.

<sup>9</sup> As we will come to see in Section 1.0 of this Chapter and also in Chapter Five of this thesis, currently only the customary arbitration mechanism is legally recognized and binding.

In Part Two, we examine the judicial structure in modern Nigeria. We highlight the various Superior Courts of Record in Nigeria and briefly discuss the scope of each of their jurisdictions. In the third and final part of this chapter, we critically discuss the major problems of the Nigerian judiciary. We conclude this chapter by making recommendations to improve the efficiency and standard of the courts.<sup>10</sup> Most important of these recommendations, is the introduction of a new, bespoke and viable domestic arbitration practice in Nigeria.

## 1.0 BACKGROUND

Prior to the colonization of Africa, the geographical area now known as Nigeria was made up of independent groups of people, each having its own and somewhat unique culture.<sup>11</sup> This culture encapsulated the different institutions and practices with which the people administered the various aspects of their life.<sup>12</sup> One of the most important of all these was a very successful dispute resolution system, which the people used to administer economic and social disputes.<sup>13</sup> As Dr Laibuta rightly noted, conflict is an integral feature of human relations and so the existence of suitable and efficient dispute resolution mechanisms was critical to the maintenance of social order.<sup>14</sup>

According to Dr Oluduro, “to deny the fact that Africans had their own ways of resolving conflicts that differ from that of the English is to swim in the ocean of misconception which is polluted with the waters of ethnocentrism and cultural shock.”<sup>15</sup> It was agreed that disputes were inevitable.<sup>16</sup> Traditional Nigeria had such

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<sup>10</sup> For example, we advocate for the financial autonomy of the judiciary, the introduction of a more transparent appointment and training process for Judges, the provision of an enabling working environment for Judges, amongst others.

<sup>11</sup> Restatement of Customary Law of Nigeria as adopted and promulgated by the Nigerian Institute of Advanced Legal Studies (Nigeria, 20 April 2013) 3.

<sup>12</sup> These different institutions and practices shared similar characteristics.

<sup>13</sup> Akintunde Obilade, *The Nigerian Legal System* (Sweet and Maxwell 1979) 17; L.A. Ayinla, ‘ADR and the Relevance of Native or Customary Arbitration in Nigeria’ (2009) 5 *The University of Ilorin Law Journal* 254, 255; Andrew Chukwuemerie, ‘The Internationalisation of African Customary law arbitration’ (2006) 14(2) *African Journal of International and Comparative Law* 143.

<sup>14</sup> K.I. Laibuta, ‘ADR in Africa: Contending with Multiple Legal Orders for Wholesome Dispute Resolution’ (2016) 82(1) *Arbitration*, 63,67.

<sup>15</sup> Olubayo Oluduro, ‘Customary Arbitration in Nigeria: Developments and Prospects’ (2011) 19(2) *Journal of International and Comparative Law* 307, 321.

<sup>16</sup> A number of Nigerian proverbs emphasize the importance of dispute resolution mechanisms. A common (Yoruba) one is ‘Agbe maja kan osi, a ja matan ni o da’ (translated it is not possible to live

dispute resolution mechanisms as litigation, arbitration and the ADRs such as mediation, conciliation and negotiation.<sup>17</sup> However as the learned Professor Chukwuemerie rightly submitted, these systems certainly did not go by any of the aforementioned English names. Each of these systems went by different native names, depending on the community in question.<sup>18</sup> At the head of these systems was the Kings' Traditional Court ("Kings' Court").<sup>19</sup> This court was supreme to the customary arbitration and customary mediation mechanisms. All these mechanisms differed in terms of jurisdiction, the process of initiating proceedings, personnel, parties' autonomy and involvement in the proceedings, as well as the enforcement process.

For example, the Kings' Court had jurisdiction over criminal matters as well as matters which affected and were likely to disrupt the corporate existence of the community as a whole.<sup>20</sup> Dr Oluduro submitted that "the King (Oba) and his council, who constituted the Supreme Court, handled serious cases like rape, murder, manslaughter, arson, kidnapping, putting dangerous medicine in a public place, assaulting a Chief or Oba's wife, adultery with an Olori (Oba's) wife, land cases etc."<sup>21</sup> The Kings' Court also entertained appeals arising from the other dispute resolution methods<sup>22</sup> and was the final "bus stop" for disputes arising within the community.<sup>23</sup>

Customary arbitration was however used to resolve private and trade disputes between members of the community as well as disputes arising between two independent communities. Customary mediation on the other hand was used to administer domestic disputes in smaller social orders like the family.<sup>24</sup> It must be

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together and not have disagreements, not finding solutions to the constant conflict is what is condemnable).

<sup>17</sup> Andrew Chukwuemerie, 'Salient Issues in the Law and Practice of Arbitration in Nigeria' (2006) 14 *African Journal of International and Comparative Law* 1, 4.

<sup>18</sup> D.A Offiong, 'Conflict Resolution among the Ibibio of Nigeria' (1997) 53 *Journal of Anthropological Research* 423, 431; Olubayo Oluduro (n 15) 331.

<sup>19</sup> This was the central and Supreme Court of the land.

<sup>20</sup> T.O Elias, *The Nature of African Customary Law* (1<sup>st</sup> edn, Manchester U.P 1956) 213.

<sup>21</sup> Olubayo Oluduro (n 15) 312.

<sup>22</sup> Martin Chukwuka Okany, *The Role of Customary Courts in Nigeria* (Fourth Dimension Publishing Co Ltd 1984) 3.

<sup>23</sup> Ben Nwabueze, *Machinery of Justice in Nigeria* (1<sup>st</sup> edn, Butterworth's, 1963) 45; Olubayo Oluduro, 'Customary Arbitration in Nigeria: Developments and Prospects' (n 15) 312.

<sup>24</sup> O Adekile, 'Legal Frameworks for Settling Marital Disputes through Reconciliation in Nigeria' <[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1503384](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1503384)> accessed 22 June 2014.

pointed out that the African idea of family is more inclusive than the western idea.<sup>25</sup> For example, a marriage between a man and a woman is said to be a marriage between their families and in certain instances, their communities.<sup>26</sup>

In concluding this section, it is important to emphasize that of all the pre-colonial methods; only the customary arbitration mechanism is legally recognised by the current Nigerian law.<sup>27</sup> Today, the Kings' Court is of no legal and/or binding significance in modern Nigeria. This is attributable to the advent and use of the English styled laws and courts in Nigeria. *Section 6(1) of the 1999 Constitution of the Federal Republic of Nigeria*<sup>28</sup> ("the Nigerian Constitution") expressly vests all forms of judicial power in what it refers to as Superior Courts of Record. *Section 6(5) of the Constitution* goes on to list these courts, which does not directly or indirectly include the Kings' Court.<sup>29</sup>

In replacing the Kings' Court, many States have through their legislative bodies established Area or Customary Courts in the remotest communities.<sup>30</sup> This power is exercised pursuant to *Section 6(5) (k) of the Nigerian Constitution*, which empowers the State House of Assembly to create lower courts as they may deem necessary.<sup>31</sup> These Area and Customary Courts take the place of the Kings' Court within these societies. Any attempt by any King or Chief to exercise any form of binding judicial power in modern Nigeria is therefore inconsistent with the provisions of the Constitution and to the extent of this inconsistency, null and void.<sup>32</sup>

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<sup>25</sup> Nonso Okoreafejeke, *Law and Justice in Post-British Nigeria: Conflicts and Interactions between Natives and Foreign Systems of Social Control in Igbo* (1<sup>st</sup> edn, Greenwood Publishing 2002) 128.

<sup>26</sup> African Marriage [www.africanmarriage.info/](http://www.africanmarriage.info/) accessed 6 April 2016.

<sup>27</sup> The mechanism is integral to this thesis and is discussed in greater detail in Chapter Five.

<sup>28</sup> This is the Constitution currently in force in Nigeria.

<sup>29</sup> We highlight and discuss these courts in Section 2.0 of this Chapter.

<sup>30</sup> Charles Mwaluma, *The Nigerian Legal System* (Vol 1, Peterland Publishers 2008) 32.

<sup>31</sup> The 1999 Constitution of the Federal Republic of Nigeria.

<sup>32</sup> Section 1(3) of the 1999 Nigerian Constitution.

## 2.0 THE JUDICIAL SYSTEM IN MODERN NIGERIA: Scope and Jurisdiction.<sup>33</sup>

Section 6 (1) and (2) of the Nigerian Constitution<sup>34</sup> vests the judicial powers of the Federal Republic of Nigeria in what it refers to as Superior Courts of Record.<sup>35</sup> In describing these Superior Courts, Professor Obilade rightly opined that they “have minimal jurisdictional limits with respect to the type of subject-matter but they are not limited in jurisdiction with respect to the mere value of the subject-matter of a case.”<sup>36</sup> The Superior Courts of Record in Nigeria are:

1. The High Court of the States and the Federal Capital Territory (FCT), Abuja;
2. The Federal High Court;
3. The National Industrial Court;
4. The Customary and Sharia Court of Appeal of the States and the FCT, Abuja;
5. The Court of Appeal; and
6. The Supreme Court of Nigeria.<sup>37</sup>

We would at this point briefly discuss the jurisdiction of these courts.

### 2.1 High Court of the State and the FCT

Sections 270 and 255 of the Nigerian Constitution established a High Court for the thirty-six (36) States of Nigeria<sup>38</sup> and the Federal Capital Territory (FCT).<sup>39</sup> Each State High Court is divided into as many judicial divisions as is deemed necessary by the Chief Judge. This is mainly for administrative purposes.

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<sup>33</sup> These English-styled courts were introduced as part of the colonial policies of the British colonial government. See K.I. Laibuta, ‘ADR in Africa: Contending with Multiple Legal Orders for Wholesome Dispute Resolution’ (2016) 92(1) Arbitration 63. For a more detailed discussion on the introduction of the English-styled courts in Nigeria, see Akintunde Obilade, *The Nigerian Legal System* (Sweet and Maxwell 1979) 17.

<sup>34</sup> 1999.

<sup>35</sup> Section 6(5) of the Constitution goes ahead to list the Courts that make up the Superior Courts of Record in Nigeria.

<sup>36</sup> Akintunde Obilade, *The Nigerian legal system* (Sweet and Maxwell 1979) 169.

<sup>37</sup> See section 6(5) of the Nigerian Constitution.

<sup>38</sup> Section 3 of the Nigerian Constitution lists the thirty (36) States of Nigeria.

<sup>39</sup> The FCT is the capital of Nigeria and is based in Abuja.



The High Court<sup>40</sup> has what can be best referred to as a general jurisdiction<sup>41</sup> to “hear and determine any civil proceeding in which the existence or extent of a legal right, power, duty, liability, privilege, interest, obligation or claim is in issue or to hear and determine any criminal proceedings involving or relating to any penalty, forfeiture, punishment or other liability in respect of any offence committed by any person”.<sup>42</sup>

The court is usually constituted by at least one Judge<sup>43</sup> and is only bound by decisions of the Court of Appeal and the Supreme Court of Nigeria.<sup>44</sup>

## 2.2 The Federal High Court

*Section 249 of the Constitution* established one Federal High Court with jurisdiction throughout Nigeria.<sup>45</sup> In order to effectively administer Nigeria however, the Federal High Court has judicial divisions in all the major cities in Nigeria.

In the previous subsection, we saw that the State High Court has general jurisdiction over civil disputes in Nigeria. This jurisdiction has however been said to be subject to any exclusive jurisdiction bestowed upon any other court by the Constitution.<sup>46</sup> One of such exceptions is *Section 251 of the Constitution*, which provides for the jurisdiction of the Federal High Court.

By virtue of *Section 251(1)(a)-(s) of the Constitution*, the Federal High Court has jurisdiction (to the exclusion of all other courts) in civil causes and matters relating to taxation, banking, intellectual property, carriage of goods by sea, bankruptcy and insolvency, among other listed issues. The Supreme Court has held in *People's*

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<sup>40</sup> By High Court, we mean both the High Courts of the FCT and the State High Court in each of the thirty six States.

<sup>41</sup> Under the former 1979 Constitution, the jurisdiction of the State High Court was regarded as unlimited.

<sup>42</sup> Section 272 of the Nigerian Constitution.

<sup>43</sup> *ibid* section 273.

<sup>44</sup> *ibid* sections 230, 241, 242, 243.

<sup>45</sup> The Federal High Court was formerly called the Federal Revenue Court. It was established by the Federal Revenue Court Act No 13 of 1973 but was restyled by Section 230(2) of the 1979 Constitution as the Federal High Court.

<sup>46</sup> Section 271 of the Nigerian Constitution 1999.

*Democratic Party v Timipre Sylva & 2 Ors*<sup>47</sup> that all other items not listed in *Section 251 of the 1999 Constitution* are to be heard and determined by the State High Court.<sup>48</sup>

The Federal High Court is duly constituted if it consists of at least one Judge<sup>49</sup> and is only bound by decisions of the Court of Appeal and the Supreme Court of Nigeria.

### **2.3 The National Industrial Court (“NIC”)**

*Section 254A of the Constitution* established the National Industrial Court<sup>50</sup> to exclusively administer civil causes and matters related to or connected with any labour, employment, trade union, industrial relations and matters arising from workplace, the conditions of service including health, safety, welfare of labour, employee and worker. The court also has exclusive jurisdiction in civil matters relating to or arising from the Factories Act, Trade Disputes Act, Trade Unions Act, Workmen’s Compensation Act or any other Act or Law relating to labour, employment, industrial relations, workplace or any other enactment replacing the Act or Laws.<sup>51</sup>

One interesting thing about the NIC as against the other courts, is that except in cases relating to the fundamental rights of parties (or any other situation prescribed by the National Assembly in the future), *Section 243(2) of the Constitution* makes the decision of the NIC on any civil matter, final on parties.<sup>52</sup> In an exceptional situation where a matter proceeds on appeal, the decision of the Court of Appeal is final.<sup>53</sup> Decisions of the Supreme Court as it relates to general issues like practice and procedure, are however still binding on the NIC with no exceptions whatsoever.

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<sup>47</sup> (2012) 4-5 SC 36.

<sup>48</sup> This decision of the Court is to an extent faulty since the Constitution in *Section 272* subjects the jurisdiction of the State High Court not only to that of the Federal High Court but also to “others”. In *Section 3.5* of this chapter, we interpret “others” to include issues involving customary law and sharia law, which should be within the jurisdiction of the Customary and Sharia Court of Appeal respectively.

<sup>49</sup> *Section 253* of the Nigerian Constitution.

<sup>50</sup> The Constitution of the Federal Republic of Nigeria (Third Alteration) Act 2010.

<sup>51</sup> *ibid* section 254C.

<sup>52</sup> *ibid* section 243(2).

<sup>53</sup> *ibid* section 243(4).

The NIC is duly constituted if it consists of at least one Judge and is only bound by decisions of the Court of Appeal and the Supreme Court of Nigeria.<sup>54</sup>

## **2.4 Customary and Sharia Courts of Appeal of the FCT and the State**

In our earlier discussions, it was pointed out that prior to the colonization of the geographical location now known as Nigeria, her people had their own unique system of law, which is today known as customary law.<sup>55</sup> This law even though completely overshadowed by common law, Nigerian statute and case law, is still in existence and remains a part of the Nigerian law.

The Customary Court of Appeal and the Sharia Court of Appeal have appellate and supervisory jurisdiction over disputes involving questions of customary and sharia law respectively.<sup>56</sup> Notwithstanding the foregoing, in reality, the practice is to submit any dispute involving customary law to the State High Court. This practice is further to the general jurisdiction of the State High Court provided for in *Section 271 of the Constitution*. This has resulted in a number of bad decisions on issues relating to customary law. We discuss this issue further on in this chapter.

These courts are duly constituted by at least three Judges<sup>57</sup> and is of coordinate jurisdiction with the State High Court, the Federal High Court and the National Industrial Court. They are therefore only bound by the decisions of the Court of Appeal and the Supreme Court of Nigeria.

## **2.5 The Court of Appeal ("COA")**

The Court of Appeal was established by *Section 237 of the Constitution*. It is the penultimate in the hierarchy of courts in Nigeria and is divided into divisions.<sup>58</sup>

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<sup>54</sup> *ibid* section 254E.

<sup>55</sup> Sharia law has been regarded as a genre of customary law. Many people have argued very vehemently against this categorization. We do not however dwell on this controversy as it is beyond the purview of this thesis.

<sup>56</sup> Section 282 and 267 of the Nigerian Constitution.

<sup>57</sup> See *ibid* section 268.

<sup>58</sup> These divisions are usually based at the State capitals in Nigeria.

The jurisdiction of the COA is both original and appellate. The original jurisdiction of the COA empowers it to hear and determine any question as to whether;

1. any person has been validly elected to the office of President or Vice President under the Nigerian Constitution;<sup>59</sup> or
2. the term of office of the President or Vice-President has ceased; or
3. the office of President or Vice-President has become vacant.<sup>60</sup>

The appellate jurisdiction of the COA enables it to hear and determine (to the exclusion of any other court of law in Nigeria), appeals from the Federal High Court, National Industrial Court, the High Court of the FCT and the States, the Sharia Court of Appeal of the FCT and the States, the Customary Court of Appeal of the FCT and the State and the decision of a Court Martial.<sup>61</sup>

In order to exercise its jurisdiction, a COA panel must be constituted by at least three Justices. In a dispute involving the application of sharia or customary law, the three Justices must be knowledgeable in these respective areas of law.<sup>62</sup>

## **2.6 The Supreme Court ("SC")**

The Supreme Court of Nigeria was established by *Section 230 of the Constitution*. It is the apex and final court in the hierarchy of courts in Nigeria. Accordingly, any decision emanating from the Supreme Court on any issue is by the doctrine of stare decisis binding on all other courts in Nigeria.<sup>63</sup>

The jurisdiction of the SC is mainly appellate.<sup>64</sup> The SC is however empowered to exercise original jurisdiction in limited and specific situations. This includes disputes between:

1. the Federal and State governments;
2. any of the Thirty (36) States in Nigeria;<sup>65</sup>

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<sup>59</sup> *Dikko Yusuf & Anor v Olusegun Obasanjo & 2 Ors* (2004) 5 SCM 174.

<sup>60</sup> Section 239 of the Nigerian Constitution.

<sup>61</sup> *ibid* section 240.

<sup>62</sup> *ibid* section 247.

<sup>63</sup> *Nigeria Airport Authority v Chief Dick Celestine Okoro* (1995) 7 SCNJ 1.

<sup>64</sup> *Peter Nemi & Ors v The State* (1994) 10 SCNJ 1.

<sup>65</sup> Section 232(1) of the Nigerian Constitution.

3. the National Assembly and the President;
4. the National Assembly and one of the thirty-six (36) States in Nigeria; and
5. the National Assembly and a State House of Assembly.<sup>66</sup>

In relation to the appellate jurisdiction of the SC, an appeal can only lie from the decision of the COA to the SC.<sup>67</sup> The SC's decision is final and binding on every court in Nigeria including itself.<sup>68</sup> The apex court has however held that it is allowed to revisit or overrule any of its previous decisions seen to be impeding the proper development of law, or any decision that has led to results which are unjust or which is seen to be contrary to public policy.<sup>69</sup> In situations where any lower court is the final court in regards to a particular issue, any decision emanating from such lower court is not binding on the Supreme Court.<sup>70</sup>

In order to exercise its jurisdiction, a Supreme Court's panel is generally expected to be constituted by not less than five Justices of the Supreme Court.<sup>71</sup> However, in order to be lawfully seised of a matter falling within the original jurisdiction of the Supreme Court, the panel must be constituted by seven Justices.<sup>72</sup>

### 3.0 THE NIGERIAN JUDICIARY: A Dysfunctional Institution

As we mentioned in the introduction, the performance of the Nigerian judiciary has in the past few years come under intense scrutiny. It would seem as if the sanctity of

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<sup>66</sup> Supreme Court (Additional Original Jurisdiction) Act 2002, Chapter S16 Laws of the Federation of Nigeria; See also *Attorney General of the Abia State v Attorney General of the Federation & Ors* (2007) 2 SCNJ 305; *Attorney General Rivers State v Attorney General Akwa Ibom & Attorney General of the Federation* (2011) 3 SC 1.

<sup>67</sup> *SPDC (Nig) Ltd v. Chief Tigbara Edankue & Ors* (2009) 6-7 SC 74; *Prince Oyesunle Alabi Ogundare & Anor v Shittu Ladokun Ogunlowo & 3 Ors* (1997) 5 SCNJ 281.

<sup>68</sup> *Francis Asanya v The State* (1991) 4 SC 42; *University of Lagos & Anor v Aigoro* (1984) NSCC 745; *Prince Yahaya Adigun & 2 Ors v Attorney General of Oyo State & 18 Ors* (1987) 4 SC 272; *Associated Discount House Ltd v Amalgamated Trustees Ltd* (2007) 7 SCNJ 419; *Alhaji Muhammadu Maigari Dingyadi & Anor v Independent National Electoral Commission & 2 Ors* (2011) 4 SC (Pt 1) 1.

<sup>69</sup> *Akinsanya v U.B.A Ltd* (1986) 17 NSCC (Pt II) 968; *Basinco Motors ltd v Woemann line* (2009) 5-6 {Pt II} 123; *Bashir M. Dalhatu v. Ibrahim S. Turaki* (2003) 10 SCM 153.

<sup>70</sup> *Brig. General Mohammed Buba Marwa (RTD) & Anor v. Admiral Murtala Nyako (RTD) & 9 Ors* (2012) 1 SC (Pt III) 44.

<sup>71</sup> Section 234 of the Nigerian Constitution.

<sup>72</sup> *ibid* proviso to section 234.

the courts has been rubbished.<sup>73</sup> Judicial officers have been trailed by accusations of corruption and dereliction of duty<sup>74</sup> and Judges have been known to give bad decisions.<sup>75</sup> In fact, the courts as a whole have been portrayed as underperforming.

According to Dr Ibrahim Abdulahi, “that the nations’ judiciary is currently passing through a difficult and traumatic phase in its annals is quite obvious and certainly not in doubt. It is a phase which is inevitably marked by deep loss of faith in the judicial process and the courts. Claims of ethnic lop-sidedness in the constitution of the Federal judiciary, serious allegations of corruption, ineptitude, laziness, incompetence against judicial officers, charges of abuse of office even against the Supreme Court judges...”<sup>76</sup> seem to be the normal situation in Nigeria.

Theophilus Aver and Justin Orba paint a more detailed picture when they write that “it is a plain truth that Nigerian courts of justice have varying operational difficulties, ranging from inadequate infrastructure, insufficient number of judicial and non-judicial personnel, debilitating delay in hearing and determination of civil, criminal and electoral cases and appeals, inadequate emolument, and lack of a reliable research resource to decide cases. The judiciary is also beset by serious ethical problems, including an increasingly nepotistic mode of appointment of judges and elevation to the higher judicial benches and cases of corruption and perversion of justice...The image of the judiciary in Nigeria today is that of an institution where anything goes...”<sup>77</sup> Professor Okechukwu Oko goes on to state that “trials often turn into charades where powerful litigants aided by unethical lawyers and faithless judges, manipulate the judicial process to achieve preordained outcomes”.<sup>78</sup> Dr Osita Ogbu

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<sup>73</sup> Douglas Anele, ‘Criticisms and Growth of Democracy in Nigeria’ *Vanguard* (16 June 2013) <[www.vanguardngr.com/2013/06/criticism-and-the-growth-of-democracy-in-nigeria-3/](http://www.vanguardngr.com/2013/06/criticism-and-the-growth-of-democracy-in-nigeria-3/)> accessed 5 April 2014.

<sup>74</sup> Tobi Soniyi, ‘NJC Retires Justice Olotu, Inyang for Gross Misconduct’ *Thisday* (6 March 2014) <[www.thisdaylive.com/articles/njc-retires-justices-olotu-inyang-for-gross-misconduct/172577/](http://www.thisdaylive.com/articles/njc-retires-justices-olotu-inyang-for-gross-misconduct/172577/)> accessed 5 April 2014.

<sup>75</sup> *Okpuruwu v Okpokam* (1988) 4 NWLR pt 90, 554; *Agu v Ikewibe* (1991) 3 NWLR pt 180.

<sup>76</sup> Ibrahim Abdullahi, ‘Independence of the Judiciary in Nigeria: A myth or reality’ (2014) 2(3) *International Journal of Public Administration and Management Research* 55, 56.

<sup>77</sup> Theophilus Aver and Justin Orba, ‘Judiciary and Democracy, Issues in Contemporary Nigerian Society’ (2014) 2(1) *Global Journal of Arts, Humanities and Social Society* 85, 86, 90.

<sup>78</sup> Okechukwu Oko, ‘Seeking Justice in Transnational Societies: An Analysis of the Problems and Failures of the Judiciary in Nigeria’ (2005-2006) 31 *Brooks Journal of International Law* 9, 16.

points out that “the level of official corruption and moral degeneracy in Nigeria is alarming and agonising. The ills are not only deep, but also pervasive, covering all social institutions and private lives. The value system of Nigeria has been completely devastated...Corruption has become a way of life in Nigeria and since the Nigerian judiciary is composed of Nigerians, the story cannot be expected to be different”.<sup>79</sup> The Judges have in many instances come up with very controversial decisions, which have called to question their credibility and/or their ability and understanding of basic legal principles.<sup>80</sup>

Unfortunately, all attempts at devising, effecting and implementing reforms have been “at the level of abstraction and total unseriousness”.<sup>81</sup> Generally, while the Nigerian government is always quick to set up reform committees, many of the resultant reports unfortunately never see the light of day for mostly political reasons.<sup>82</sup>

The implications of a failed judiciary are many and very varied, chief of which is the loss of confidence in the administration of justice system. This according to the former Chief Justice of Nigeria, Aloma Mukhtar, “rubbishes our often brandished favourable investment climate and translates to a huge disincentive to potential foreign investors in Nigeria.”<sup>83</sup> This is sad especially at a time when the investment climate in Nigeria seems to be at its best.<sup>84</sup> Furthermore, Professor Paul Idornigie rightly submitted that “in a developing and developed economy, it is well recognised that the availability of a prompt, effective and economical means of dispute resolution is an indispensable

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<sup>79</sup> Osita Ogbu (n 1) 724.

<sup>80</sup> A good example is James Ibori, a former Governor of one of the oil producing States in Nigeria, accused of embezzling over 250 million pounds of State money. James was acquitted of accusations of corruption and money laundering under very questionable circumstances at a Nigerian Court. However, when a similar case was filed at the English courts, he was found guilty and sentenced to jail for 13 years in 2012. See Editorial, ‘Former Nigeria state governor James Ibori receives 13-year sentence’ *The Guardian* (17 April 2012) <[www.theguardian.com/global-development/2012/apr/17/nigeria-governor-james-ibori-sentenced](http://www.theguardian.com/global-development/2012/apr/17/nigeria-governor-james-ibori-sentenced)> accessed November 29 2015.

<sup>81</sup> Josef Omorotionwan, ‘Nigerian Judiciary: Most need, most neglected’ *Vanguard* (23 April 2015) <[www.vanguardngr.com/2015/04/nigerian-judiciary-most-needed-most-neglected/](http://www.vanguardngr.com/2015/04/nigerian-judiciary-most-needed-most-neglected/)> accessed May 25 2015.

<sup>82</sup> In Chapter Five for example, we will see that in 2005, there was a failed attempt to reform the existing Nigerian Arbitration and Conciliation Act.

<sup>83</sup> Editorial, ‘Lethargy and Delayed Justice in Nigerian Courts’ *Daily Independent* (6 June 2012) <<http://dailyindependentnig.com/2012/06/lethargy-and-delayed-justice-in-nigerian-courts/>> accessed 07 January 2016.

<sup>84</sup> See BBC News (n 4).

element in the ordinary growth and encouragement of international investment and trade.”<sup>85</sup> The implications of a dysfunctional judiciary therefore affect the development of any economy since foreign investment no doubt remains a major economy booster especially in developing countries. Potential investors are likely to be wary of a country where their legal rights cannot be guaranteed.

Furthermore, the failure of the judiciary has resulted in a significant loss of confidence by Nigerian citizenry in the judicial system. In recent years, there has been an increase in incidences of jungle justice,<sup>86</sup> arising mostly as a result of the dissatisfaction with the quality and efficiency of the Nigerian judicial system.<sup>87</sup> It has been alleged that known criminals, who have been discharged and/or acquitted by the courts have returned to exert revenge on their accusers. Today, the average Nigerian on the street has become a law to himself, because it is assumed that justice is never obtained at the courts. Rather than turn suspected criminals over to be tried within the judicial system, citizens have established vigilantes who without any formal trial, set suspected criminals ablaze right on the streets and in broad daylight.<sup>88</sup>

The failure of the judiciary has been attributed to different factors. We would at this point discuss some of the problems of the Nigerian judiciary.

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<sup>85</sup> Paul Idornigie, ‘The 1988 Nigerian Arbitration and Conciliation Act: Need for Review’ (2003) 6(3) *International Arbitration Law Review* 50,51.

<sup>86</sup> This refers to a situation where people take the law into their hands and punish suspect criminals for alleged crimes without resort to the State’s judicial system. This may involve the setting ablaze of a suspect right on the street.

<sup>87</sup> BBC News (n 3).

<sup>88</sup> Editorial, ‘Jungle Justice! Armed Robber Burnt To ‘Ashes’ In Owerri (Graphic Scene)’ *Nigeria News* (21 October 2015) <<http://news2.onlinenigeria.com/headline/437020-jungle-justice-armed-robber-burnt-to-ashes-in-owerri-graphic-scene.html>>; Isaac Dachen, ‘Angry mob burn suspected robber alive in Port Harcourt’ *Pulse ng* (8 September 2015) <http://pulse.ng/gist/jungle-justice-angry-mob-burn-suspected-robber-alive-in-port-harcourt-id4147263.html>; Editorial ‘Suspected Kidnapper burnt to death in Lagos’ *TVC News* <<http://tvcnews.tv/?q=article/nigeria-suspected-kidnapper-burnt-death-lagos>>; Bukola Idowu and ors, ‘Jungle Justice: Mob Burn Suspected Kidnapper’ *Leadership* (8 May 2014) <<http://leadership.ng/news/369957/jungle-justice-mob-burn-suspected-kidnapper>>; Joe Odumakin, ‘Rituals, Kidnaps, Jungle Justice: Enough of Horror in Nigeria’ *Sahara Reporters* (4 April 2014) <<http://saharareporters.com/2014/04/04/rituals-kidnaps-jungle-justice-enough-horror-nigeria-joe-odumakin>> all accessed 30 November 2015.



### 3.1 Industrial Strike Actions, Perennial Backlog of Cases and Delay in Proceedings.

In the last few years, there has been a rise in the number of cases being instituted at the Nigerian courts. Unfortunately, the courts at various levels have been unable to determine cases at the same rate at which they are instituted.<sup>89</sup> This has resulted into a backlog and by extension, a delay in the administration of justice, which has not only increased the cost of litigation in Nigeria,<sup>90</sup> but has also in some other instances resulted in a total loss of rights.

Honourable Justice Dahiru Musdapher (former Chief Justice of the Federation), in a speech delivered at the Nigerian Institute of Advanced Legal Studies Fellows Lectures, submitted that even if litigants were stopped from commencing appeals at the Supreme Court, it will still take the apex court many years to clear the backlog of cases.<sup>91</sup> The President (as she then was) of the Commonwealth Lawyers Association, Mrs Boma Ozobia, also opined that even “if all panels of the Court of Appeal (in Nigeria) sit for seven days a week for the next seven years, they would still not be able to conclude all currently pending appeals before the Court....”<sup>92</sup> Only recently, Nigeria was awash with news about the Supreme Court of Nigeria’s judgement on an oil spillage dispute involving Shell Petroleum Development Company, a proceeding spanning thirty-two years.<sup>93</sup> During this period, some of the beneficiaries and witnesses to the proceedings were reported to have died. One wonders what would have happened if after all the time and resources expended on the case, the Supreme Court had ordered the matter to be retried, which was a legal possibility.

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<sup>89</sup> B.A Bukar, ‘Legal Framework for the Resolution of International Commercial Disputes: An examination of Nigeria’s Arbitration Laws’ (1999) 16(1) *Journal of International Arbitration* 47,48.

<sup>90</sup> Johnson Amadi, ‘Enhancing Access to Justice in Nigeria with Judicial Case Management: An evolving Norm in Common Law Countries’ (2009) Available at SSRN 1366943.

<sup>91</sup> D. Musdapher, ‘The Nigerian Judiciary: Towards Reform of the Bastion of Constitutional Democracy’ Fellows’ (Lectures Series, Nigerian Institute of Advanced Legal Studies, Lagos 2011).

<sup>92</sup> Innocent Anaba, ‘CJN, CJ can address problems of Court by Practice Directions’ *Vanguard* (10 January 2013) <[www.vanguardngr.com/2013/01/cjn-cjs-can-address-problems-of-courts-by-practice-directions-boma-ozobia/](http://www.vanguardngr.com/2013/01/cjn-cjs-can-address-problems-of-courts-by-practice-directions-boma-ozobia/)> accessed 5 April 2014.

<sup>93</sup> Editorial, ‘Court orders Shell to pay 30 million’ *Punch* (6 June 2015) <[www.punchng.com/news/oil-spill-32-years-after-scourt-orders-shell-to-pay-n30m-compensation/](http://www.punchng.com/news/oil-spill-32-years-after-scourt-orders-shell-to-pay-n30m-compensation/)> accessed 6 June 2015.

Notwithstanding the fact that *Section 36 of the Nigerian Constitution*<sup>94</sup> provides for speedy trials, Professor Phillip Aka argues that there is hardly any case that is conducted with any real urgency and that “undue delay remains an obstacle for parties who seek to do business with or via Nigerian Courts”.<sup>95</sup> In all fairness to the Nigerian Judiciary (and as we will come to see), some of the contributing factors extend beyond the actions or omissions of the courts.

In a survey conducted by the Nigerian Institute of Advanced Legal Studies (“NIALS”), it was revealed that the Lagos and Port Harcourt divisions of the Federal High Court, which as we have previously seen have jurisdiction over a selected range of technical subjects, have about fifteen thousand cases pending in each of their courts. The Lagos and Port Harcourt divisions of the Federal High Court under consideration make up only two of the several divisions of the Federal High Court. In another survey conducted by NIALS, it was revealed that in the years 2008, 2009 and 2010, the National Industrial Court was only able to complete 1.9%, 3.3% and 8.4% respectively of cases pending before it. The Court of Appeal fared much better as it was able to determine 11.4%, 10.3%, 12.6% and 24.3% respectively of cases pending before it between 2008 and 2011. For the years 2009 and 2010, the Federal High Court was only able to determine 14.8% and 10.6 of the cases pending before it.<sup>96</sup> The present Chief Justice of Nigeria, Mahmud Mohammed was on February 2015 quoted to have said that “the (Supreme Court) registry is currently burdened with over 5000 appeals...this situation is indeed disturbing and sobering”.<sup>97</sup> This situation is truly very disturbing especially when we consider the fact that the Supreme Court presently consists of only sixteen Justices.<sup>98</sup>

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<sup>94</sup> 1999 Constitution of the Federal Republic of Nigeria.

<sup>95</sup> Phillip C. Aka, ‘Judicial Independence Under Nigeria’s Fourth Republic: Problems and Prospect’ (2014) 45 California Western International Law Journal 1, 63.

<sup>96</sup> NIALS, *Nigeria’s Judicial Performance Evaluation 2008-2011* (E Azinge, O. Eruaga & C.. Anieds eds NIALS Press, Lagos 2012).

<sup>97</sup> Editorial, ‘Preventing Future Judiciary Strike’ *Punch* (3 April 2015) <[www.punchng.com/editorials/preventing-future-judiciary-workers-strike](http://www.punchng.com/editorials/preventing-future-judiciary-workers-strike)> accessed 7 May 2015.

<sup>98</sup> The official website of the Supreme Court of Nigeria <<http://supremecourt.gov.ng/Profile/Justices>> accessed 10 May 2015.

The situation at the State's High Court is not any better. For example, it is on record that between 2008 and 2010, twenty-five thousand, eight hundred and seven (25,807) new cases were filed at the High Court of Lagos.<sup>99</sup> One must quickly point out in passing that it is unfortunate that while the courts have handwritten records of the new cases instituted at each division, there is no consolidated record of all the cases instituted in the State. Furthermore, very important is the fact that there is no official record of successfully completed cases.<sup>100</sup>

These problems of backlog and delay of cases have been compounded by long and recurring industrial strike actions, which seem to have become a permanent feature of the Nigerian judiciary. During an informal visit to the Nigerian courts in April 2015, this writer found a totally paralysed judiciary. Investigations conducted revealed that the courts in many States had at various times and for different reasons, proceeded on industrial strike actions. For example, judiciary staff of the Rivers State's High Court, as at the time of writing this chapter, had been on strike for almost nine months.<sup>101</sup> Rivers State plays host to one of the most commercially vibrant cities in Nigeria, Port Harcourt. One can only imagine the implications of this strike on commercial relations and disputes arising within the State.

Further investigation revealed that as of the time of writing this chapter in April 2015, almost twenty (20) out of the thirty-six (36) State High Courts in Nigeria were on strike and had been in that state for almost five (5) months.<sup>102</sup> This strike dates back to a nationwide strike declared on the 5<sup>th</sup> of January 2015 by the Judiciary Staff Union of

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<sup>99</sup> Available at <<http://resourcedat.com/resources/DIGESTOFSTATISTICS2011-01.pdf> more particularly pages 243-249> assessed 3 April 2014.

<sup>100</sup> During the writer's visit to the State High Courts in Oyo and Lagos State in April 2015, he was unable to ascertain the number of cases completed by the court due to lack of records and absence of a proper book keeping system. There was therefore no way of measuring the performance of these courts.

<sup>101</sup> Victor Azubuike, 'Rivers: Judiciary Workers to resume after 8 months old strike' *Daily Post Ng* (1 February 2015) <<http://dailypost.ng/2015/02/01/rivers-judiciary-workers-resume-work-8-month-old-strike/>> accessed 9 May 2015.

<sup>102</sup> Michael Oche, 'Judiciary Workers Still On Strike in 15 States' *Leadership* (10 April 2015) <<http://leadership.ng/news/424370/judiciary-workers-still-on-strike-in-15-states>> accessed 10 May 2015.

Nigeria ("JUSUN"),<sup>103</sup> in a bid to secure fiscal autonomy from the executive arm of government.<sup>104</sup>

Not only do the strikes compound the existing backlog and delay problem, litigants are during the period of strike denied their constitutional right of access to the courts, which in many cases can lead to a total loss of rights. For example, a party who ordinarily may have been entitled to an interim or interlocutory injunction against an illegal act perpetuated against him, may very well find himself without any remedy during the period of strike. No wonder citizens have continued to complain of the increasing number of delayed trials.<sup>105</sup>

It is clear that there is need to devise methods of curtailing and then reducing the large backlog of cases.<sup>106</sup> The Chief Justice of Nigeria, Mahmud Mohammed, rightly opined that the current reality paints a sobering picture. The number of cases pending before the court has reached critical proportions and stakeholders must use all appropriate means to stop it from spiralling out of control.<sup>107</sup> This thesis aims to respond to and address these problems appropriately.

### 3.2 Lack of Financial Autonomy and Independence

In our previous discussion, we mentioned that the majority of the State High Courts in Nigeria had been on a prolonged industrial strike as at the time of writing this part of the thesis. This strike dates back to a judgement delivered on the 13<sup>th</sup> of January 2014 by Justice Adeniyi Ademola of the Federal High Court, which upheld the judiciary's right to fiscal autonomy.<sup>108</sup>

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<sup>103</sup> JUSUN is the umbrella union of judiciary workers in Nigeria.

<sup>104</sup> This issue is discussed in Section 3.1 of this chapter.

<sup>105</sup> Omosile Ola, 'Jonathan Reaffirms Commitment to Judicial Reform' *Metropole* (20 November 2014) <<http://www.metropole.ng/index.php/promo/item/3077-jonathan-reaffirms-commitment-to-judicial-reforms>> accessed 3 June 2016.

<sup>106</sup> Andrew Chukwuemerie, (n 17) 13.

<sup>107</sup> Ikechukwu Nnochiri, 'Nigerian Judiciary Overburdened, CJN Cries out' *Vanguard* (5 February 2015) <<http://www.vanguardngr.com/2015/02/nigerian-judiciary-overburdened-cjn-cries/>> accessed 30 September 2015.

<sup>108</sup> Eric Ikhilae, 'Comply with fiscal autonomy judgment' *The Nation* (January 15, 2014) <<http://thenationonlineng.net/new/comply-with-fiscalautonomy-judgment/>> accessed 15 April 2014.

The said action was instituted in protest of the present practice where the various heads of the courts have to go cap in hand to the executive before they can perform even their most basic duties.<sup>109</sup> This practice by the executive arm of government arguably infringes the ability of the judiciary to independently and efficiently perform its function.<sup>110</sup> As Professor Olowofoyeku rightly noted, the Nigerian judiciary can only “administer justice according only to law, disavowing all irrelevant considerations, and without pressure from or deference to the views of government, or any other person,”<sup>111</sup> when it is given free rein over all its affairs.

Unfortunately and contrary to the aforementioned judgement of the Federal High Court, as well as the provision of *Section 162 (9) of the Constitution*, which provides that “any amount standing to the credit of the judiciary in the Federation Account shall be paid directly to the National Judicial Council for disbursement to the heads of court established for the Federation and the States...”,<sup>112</sup> the Federal and State Governments continue to disburse funds to individual courts like it will do to any of its Ministries. In response, JUSUN vowed not to call off their industrial strike action until the 13<sup>th</sup> of January 2014 judgement of the Federal High Court is obeyed and implemented.

The Punch Newspaper in one of its editorials noted that the Nigerian judiciary has been emasculated by the government since the country returned to democratic rule in 1999. While the executive and legislature have enjoyed financial autonomy based on the Constitution, the reverse has been the case for the third arm of government.<sup>113</sup> Professor Okechukwu Oko submitted that “hubristic politicians who cavil at the notion of judicial independence continue to display the capacity and the inclination to manipulate and control the judiciary.”<sup>114</sup> The State Chairman of the Edo State chapter of the Nigerian Bar Association, *Mrs Priscilla Iyomo*, rightly noted that the

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<sup>109</sup> Chukwudi Oputa, ‘Keynote Address’ (All Nigerian Judges Conference, London, 1982) 295.

<sup>110</sup> Andrew Chukwuemerie (n 17) 11.

<sup>111</sup> A.A Olowofoyeku, ‘The Beleaguered Fortress: Reflections of the Independence of Nigeria’s Judiciary’ (1989) 33 *Journal of African Law*, 55, 56.

<sup>112</sup> See also Section 121(3) of the Nigerian Constitution 1999 for provisions relating to the State.

<sup>113</sup> Editorial, ‘Preventing Future Judiciary Strike’ *Punch* (3 April 2015) <http://www.punchng.com/editorials/preventing-future-judiciary-workers-strike> accessed 7 May 2015.

<sup>114</sup> Okechukwu Oko (n 78) 9, 17.

unwillingness of many State Governors to obey the 13<sup>th</sup> of January 2014 judgement of the Federal High Court stems from their reluctance to lose their control over the judiciary. At present, the practice is seemingly trying to actualise the adage “whoever pays the piper, calls the tune.”

This action by the executive arm of the government clearly negates the operation of Baron Montesquieu’s separation of powers doctrine,<sup>115</sup> which has also been incorporated in the Nigerian Constitution.<sup>116</sup> Furthermore, *Section 17(1) (e) of the Constitution* also provides that the “*the independence, impartiality and integrity of courts of law...shall be secured and maintained*”.<sup>117</sup> As Duru rightly noted, “at the core of the concept of judicial independence is the theory of the separation of power: that the judiciary, which is one of the three basic and equal pillars in the modern democratic state, should function independently of the other two; the legislature and the executive”.<sup>118</sup> This is fundamental to the good working of any democratic society.<sup>119</sup>

As we will come to see, this issue of funding affects the operation, efficiency and infrastructure of the judiciary.

### **3.3 Lack of Modern Infrastructure**

Interestingly, many of the problems of the Nigerian judiciary can arguably be traced to the problem of fiscal autonomy. Professor Phillip Aka rightly noted that “the lack of fiscal autonomy has led to gross underfunding, which complicates the ability of Nigerian Courts, especially at the non-federal levels, to secure the infrastructure that Judges and other court officials need to do their jobs well”.<sup>120</sup> The late Justice C.A Oputa of the Supreme Court paints a very disheartening picture when he wrote that “the court halls and Judge’s chambers, the record books and other stationery, the judicial libraries, all these cannot be provided for without the necessary release of

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<sup>115</sup> Charles De Secondant, Baron de Montesquieu, *The Spirit of the Laws* (Thomas Nugent Trans. J.V. Prichard rev) 7 1914.

<sup>116</sup> See Sections 4, 5 and 6 of the Nigerian Constitution.

<sup>117</sup> 1999 Constitution of the Federal Republic of Nigeria.

<sup>118</sup> Onyekachi Duru, ‘An overview of Aspects and Attributes of Judicial Independence in Nigeria’ (2012) Available at SSRN 2142974.

<sup>119</sup> International Bar Association Minimum Standard of Judicial Independence (International Bar Association, 1982).

<sup>120</sup> Phillip C. Aka (n 95) 1, 32.

funds by the executive to the judicial branch”.<sup>121</sup> Unfortunately and as former Chief Justice of Nigeria Aloma Mukhtar pointed out, “over the years, funding of the courts has remained a challenge as evidenced in the condition of many courts in Nigeria today. Statistics have shown that funding from the Federal Government has witnessed a steady decline since 2010...”<sup>122</sup>

Despite little or no financial encouragement from the government, the Nigerian courts continue to work under very abysmal conditions. The judiciary is the arm of government from which much is expected but to which very little is given, the arm of government that is shut out of the budgetary process and yet is expected to perform the magic of keeping the society safe and crime free.<sup>123</sup> The majority (if not all) of the High Court Judges in Nigeria continue to record court proceedings in long hand. Judges grapple to understand the intricacies and complexities of emerging areas of law, areas that did not exist at the time of their legal training. They do this under very poor and uncomfortable conditions. Nigeria continues to battle with the problem of electricity while Judges and lawyers alike are expected to be fully robed in a wig and gown during court proceedings under the hot Nigerian weather.<sup>124</sup>

### 3.4 Corrupt and Incompetent Staff

When barely two years after Nigeria received her independence in 1960, the then Chief Justice of Nigeria, Sir Adetokunbo Ademola predicted that in about a decade, there would be an acute personnel problem, he probably did not contemplate a situation as dire as the present one.<sup>125</sup> Fifty three (53) years down the line, the Nigerian judiciary has with all due respect, almost been taken over by charlatans and people of questionable character.<sup>126</sup> Rather than being guided by a few of the quality ensuring

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<sup>121</sup> Oputa (n 109) 295.

<sup>122</sup> Adam Adedimeji, ‘JUSUN strike and fiscal autonomy for the judiciary’ *Daily Independent* (5 January 2015) <<http://dailyindependentnig.com/2015/01/jusun-strike-fiscal-autonomy-judiciary/>> accessed 7 June 2015.

<sup>123</sup> Josef Omorotionwan, ‘Nigerian Judiciary: Most need, most neglected’ *Vanguard* (23 April 2015) <[www.vanguardngr.com/2015/04/nigerian-judiciary-most-needed-most-neglected/](http://www.vanguardngr.com/2015/04/nigerian-judiciary-most-needed-most-neglected/)> accessed on May 25 2015.

<sup>124</sup> The average temperature in Nigeria is 30 degrees Celsius.

<sup>125</sup> Sir Adetokunbo Ademola, ‘Personnel Problem in the Administration of Justice in Nigeria’ (1962) 27 *Law and Contemporary Problems* 576, 579.

<sup>126</sup> Andrew Chukwuemerie (n 17)10.



measures put in place in the various establishing provisions of these courts, issues like ethnicity, quota system, federal character<sup>127</sup> and the Nigerian “man know man” syndrome have become the more important consideration in the appointment of Judges.

Commenting on the incompetence of judicial officers in Nigeria, the former Director General of the Nigerian Institute of Advanced Legal Studies, Professor Epiphany Azinge, S.A.N in a recent article opined that “It is sad however to note that in reality, sometimes the process of appointment of persons into the Nigerian Bench has been fraught with several difficulties. The common perception is that persons unsuitable for such lofty ideal of dispensing justice have by omission or commission found themselves in the corridors of justice, holding the scales unevenly and determining the fates of mortals through unworthy extraneous considerations....Persons who in the arena of law can hardly tell B from a Bull’s eye have strayed into the Bench. The sad fact is there are several Judges on the Nigerian bench who are not versed in the rudimentary matters of the law let alone tasking matters of judex and this have easily succumbed to subtle manipulations of very crafty and brilliant members of the bar”.<sup>128</sup> This has resulted in very bad decisions and a loss of confidence in the Nigerian judiciary.

In his submission on the level of corruption within the Nigerian judiciary, Dr Osahon Guobodia also opined that “unfortunately, there are many quacks and rotten eggs in the system. For instance, some Judges have regrettably compromised their judicial oaths and undermined the sanctity of the judicial process...Some Judges have in a brazen display of judicial rascality, exhibited utter contempt for their exalted offices and thereby subjected the judiciary and the legal profession in Nigeria to public

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<sup>127</sup> Section 14 of the 1999 Constitution of Nigeria provides that the composition of the Government of the Federation or any of its agencies and the conduct of its affairs shall be carried out in such a manner as to reflect the Federal character of Nigeria.

<sup>128</sup> Epiphany Azinge and Judith Fumnanya Rapu, ‘Roadmap to Judicial Transformation: Through the Lens of Retired and Serving Jurists of the Supreme Court’ (2012) [www.nials-nigeria.org/journals/Azinge%20and%20JudithRoadmap%20to%20Judicial%20Transformation.pdf](http://www.nials-nigeria.org/journals/Azinge%20and%20JudithRoadmap%20to%20Judicial%20Transformation.pdf) accessed 4 September 2014.



ridicule”.<sup>129</sup> Dr Wahab Egbewole and Dr Ibrahim Imam point out that corruption within the judiciary goes beyond bribing Judges; it also involves situations where court personnel are paid off to slow down the process or make complaints go away.<sup>130</sup>

Theophilus Aver and Justin Orba emphasise the importance of a capable and credible staff when they wrote that “no matter how well structured, properly staffed, and adequately funded the judiciary is, and no matter how good the rules governing its operation and practice are, once its actors are not regarded as credible men and women of integrity, the judiciary can hardly act as the guardian of Nigeria’s democracy, let alone operate creditably as an honest enforcer of rights and a just redresser of wrongs...”<sup>131</sup>

In a report prepared on behalf of both the Economic and Financial Crimes Commission (“EFCC”) and the National Bureau of Statistics, it was revealed that of all the public institutions in Nigeria, the corruption within the Nigerian judiciary is the highest.<sup>132</sup> Some people have however opined that it is in fact difficult to measure the level of corruption within the Nigerian judiciary. This as Professor Okechukwu Oko rightly submits is “because of the mutual benefit of corruption, the corrupt Judge and the bribe giver have no interest in reporting the crime. Corruption only gets to the surface when one of the parties feels cheated or chooses to display an uncommon sense of duty and comes forward to report on corruption. It is therefore difficult to estimate the actual extent of judicial corruption”.<sup>133</sup>

The rot and incompetence within the judiciary can to a large extent be attributed to the flawed process of appointing judicial officers, a process which we have previously pointed out is guided by nepotism, ethnicity as well as one that promotes the “who

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<sup>129</sup> Osahon O. Guobodia, ‘The relevance of the Judiciary in a Democratic Nigeria’ (2012) 20, *Afri. J. Int’l & Comp. L* 301, 318.

<sup>130</sup> Wahab Egbewole and Ibrahim Imam, ‘The Concept of Judicial Integrity in Dispensation of Justice in Nigeria’ (2014) 19(2) *Coventry Law Journal* 44, 51.

<sup>131</sup> Theophilus Aver and Justin Orba (n 77) 90.

<sup>132</sup> Gafar Ayodeji and Samuel Odukoya, ‘Perception of Judicial Corruption: Assessing its implications for democratic consolidation and sustainable development in Nigeria’ (2014) 16(2) *Journal of Sustainable Development in Africa* 67, 72.

<sup>133</sup> Okechukwu Oko (n 78) 9,15.

you know” philosophy rather than the “what you know philosophy”.<sup>134</sup> Furthermore, a factor like the federal character principle,<sup>135</sup> which is in operation in Nigeria because of her very diverse population, has proven to be a breeding ground for a deficient and very substandard judiciary. According to Professor Phillip Aka, “it has resulted in the appointment to the bench of some individuals demonstrably ill qualified to serve as Judges”.<sup>136</sup> In the process of “mixing” the court, very good and intelligent individuals are passed over in order to portray a semblance of fairness,<sup>137</sup> which ironically is in many ways a threat to Nigeria’s budding democracy.

In addition, the absence of a good and consistent welfare package also contributes to the problem of corruption presently ravaging the Nigerian judiciary. Take for example the situation in Benue and Plateau States, where judiciary workers as at the time of writing this chapter in April 2015, are reported to be owed over five (5) months of salary, one wonders how the fight against bribery and corruption can be won under such working conditions.<sup>138</sup> As the late Justice C.A Oputa of the Supreme Court also suggested,<sup>139</sup> a poor and irregular salary structure will no doubt discourage successful and experienced members of the bar, who notwithstanding their interest and suitability for the bench, will rather stick to the bar, where their sources and size of income are limitless.<sup>140</sup>

The system unfortunately provides very minimal training both immediately before the appointment of judicial officers and in the course of their work on the bench. The National Judicial Institute (“NJI”), the body established by statute to ensure the

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<sup>134</sup> Gafar Ayodeji & Samuel Odukya (n 132) 75.

<sup>135</sup> This is a constitutional principle that provides for equal representation within government employment and operations.

<sup>136</sup> Phillip C. Aka (n 95) 72.

<sup>137</sup> Sir Adetokunbo Ademola (n 125) 576, 579.

<sup>138</sup> Michael Oche (n 102).

<sup>139</sup> C.A. Oputa, ‘The Judiciary as an Unbiased Umpire in the Democratic Process’ in C. Okeke (ed), *Towards Functional Justice; Seminar Papers of Justice C.A Oputa* (Ibadan, Gold Press Ltd 2007 ) 500.

<sup>140</sup> Traditionally, a Judge is not expected to hold directorship in companies. His or her social life is cloistered and restricted to very discreet associations. Thus his/her social deprivation ought to be compensated for by generous conditions of service. See Osita Ogbu (n 1) 728.

quality of the judiciary in Nigeria,<sup>141</sup> has failed in its duty of ensuring continued training.

The “system” seems to rely very heavily on the law school training, which unfortunately is inadequate and geared towards training barristers and solicitors, and not Judges. It is difficult to understand why and how the one (1) year law school training, which has already been overstretched to train both barristers and solicitors, would be deemed adequate training for potential judicial officers. The law school training in Nigeria, like many other jurisdictions, pays little or no attention in inculcating students with the knowledge and skills needed to make a good judge.<sup>142</sup>

Besides, the job of a Judge requires much more than the standard law school training. For example, potential Judges need classes on judicial ethics and practical training sessions on how to observe witnesses. Judges also require special writing skills among many others. Dr Omaka, a former Magistrate turned academic, found the three (3) day training process for new judicial officers in Nigeria to be very inadequate.<sup>143</sup> In his opinion, it was clear that the system was relying heavily on his law school training, one he completed almost a decade before his appointment as a judicial officer.

Flowing from the above and in the light of recent developments in the international commercial world, it is pertinent that the NJI lives up to its statutory expectation. Professor Okechukwu Oko rightly opined that “the complexity of legal controversies and the passage of new laws present challenges that Judges may not be well equipped to handle without the benefit of education programmes”.<sup>144</sup> Unfortunately the management of the NJI is made up of senior Judges (retired and serving), who with all due respect, are out of tune with the realities of the international commercial world.

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<sup>141</sup> Section 3(2) (a) of the National Judicial Institute Act, Chapter N55 LFN 2004.

<sup>142</sup> Buhai, Kumari, Omaka et al, ‘The Role of Law Schools in Educating Judges to increase Access to Justice’ (2011) 24 McGeorge Global Business & Development Law Journal 161, 162.

<sup>143</sup> *ibid* 164.

<sup>144</sup> Okechukwu Oko (n 78) 12.

### 3.5 Unsuitable, Uncertain and/or Outdated Laws

In many ways, the number of bad laws existing within the polity has to a large extent contributed to the existing problems within the judiciary, especially the problems of delay and bad decisions. This has mainly been as a result of ambiguous and/or badly worded laws. Unfortunately, a number of these ambiguities can be traced to the very constitutional provisions that define the jurisdiction of some of the courts.

As we will see in Chapter Five, one area of the Nigerian law which has been subject to a series of bad decisions is customary law. The usual practice is for parties to submit any dispute involving customary law to the general jurisdiction of the State High Court.<sup>145</sup> Unfortunately, the State High Court has proven to be incapable of adequately handling disputes involving customary law.

*Section 272* of the Constitution makes the aforementioned general jurisdiction of the State High Court "subject to the provisions of *Section 251* and other provisions of this Constitution".<sup>146</sup> It is submitted that *Sections 265- 267 and 280-282 of the Constitution* are one of the anticipated exceptions to the general powers of the State High Court.

*Section 280 of the Constitution* provides that "there shall be for any State that requires it a Customary Court of Appeal for that State". Regrettably, not many States have exercised the option given to them by the Nigerian Constitution to constitute a Customary Court of Appeal. In fact, only the Federal Capital Territory, Imo State and Osun State have a fully functioning Customary Court of Appeal. This has in turn increased the burden on the State High Courts, as they find themselves saddled with the responsibilities involved in the proof of customary law even when the law makes provision for a special court with the requisite knowledge to administer issues involving this technical aspect of Nigerian law.<sup>147</sup> This has affected the quality and certainty of judgements relating to customary law.

*Section 282(1) of the said Constitution* clearly defines the jurisdiction of the Customary Court of Appeal when it provides that it "shall exercise appellate and supervisory

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<sup>145</sup> Section 272 of the Nigerian Constitution.

<sup>146</sup> Section 251 of the Nigerian Constitution deals with the jurisdiction of the Federal High Court.

<sup>147</sup> *ibid* section 281(3)(a)(b).

jurisdiction in Civil Proceedings involving questions of customary law". The word "supervisory" was defined in the Oxford English Dictionary<sup>148</sup> as "to look over, to oversee or direct the execution of (a task, activity, etc.); to have charge of or responsibility for (a business, institution, department, etc.); to preside over, to superintend..." It is therefore clear that the Customary Court of Appeal has jurisdiction over issues involving customary law (and by extension customary arbitration) and their jurisdiction should mandatorily take precedence over the State High Court's general jurisdiction.

The Nigerian Constitution in recognition of the technicality involved in the interpretation and application of customary law, mandates that in appointing the forty-nine (49) Justices of the Court of Appeal, six (6) of these must be knowledgeable in customary and Islamic law respectively. As we also see later on in this chapter, the Constitution mandates that any dispute involving customary law must be decided by a panel of the Court of Appeal constituted by customary law experts. The Constitution also makes it mandatory for the FCT to have these special types of courts.

It is therefore difficult to understand the rationale behind the position taken by the Nigerian Constitution to make the existence of a Customary Court of Appeal optional for States. This is especially (as previously alluded to) due to the fact that customary law still remains a major source of law in Nigeria.<sup>149</sup> In fact, every community in Nigeria has its own version of customary law, which operates in Nigeria. Every other issue or dispute involving land in Nigeria has a tint of customary law embedded therein. The need for a Customary Court of Appeal should therefore not be an option.

Again when we talk about the problem of delay, Nigerian lawyers have in certain instances taken advantage of the loose words of some areas of the Nigerian law to prolong judicial proceedings, to the benefit of their clients. A good example which comes to mind is Section 148 of the Electoral Act 2006, which provides that "*an election petition and an appeal, arising from under this Act shall be given accelerated hearing and shall have precedence over all other causes or matters before the Tribunal or Court*". While the said

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<sup>148</sup> Oxford Dictionary 2<sup>nd</sup> Edition.

<sup>149</sup> Obilade (n 36) 83.

law provides for accelerated hearing, it does not define a specific period within which election matters should be completed. Because State power cannot be left in vacuum, under this legal dispensation, the person against whom a petition has been brought was left to occupy the position pending the decision of the court on the election petition, which in a number of instances was almost the entire term of office being contested.<sup>150</sup> It therefore made business sense for a lawyer representing a State official to prolong the petition for as long as possible, since he not only provided reprieve for his client, albeit for a short time, he was also assured of his enormous legal fees at the expense of tax payers.<sup>151</sup>

#### **4.0 A CASE FOR REFORMS: Towards an Efficient Judicial System.**

It is obvious from our previous discussions that the judicial system in Nigeria is in a state of crisis. Professor Okechukwu Oko rightly submitted that “the Nigerian judiciary that admirably discharged its duties during the early post-independence years, now shows signs of weakness, inadequacy and corruption”.<sup>152</sup> As it is, the Nigerian judiciary is struggling under the weight of the country’s domestic disputes as well as engulfed in a lot of controversy.

Unless something drastic is done and very fast, we should expect to see a worse situation, possibly a total collapse of the judiciary in the next couple of years. This is especially in view of the recent rebasing of the Nigerian economy, which places Nigeria ahead of its closest rival, South Africa, with a GDP of 80.2 trillion naira (\$509 billion).<sup>153</sup> It is projected that the rebasing of the economy will attract investors both to the highly performing sectors as well as areas that have not experienced

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<sup>150</sup> Editorial, ‘Tribunal Sacks Ondo State governor, Olusegun Agagu, Declares Mimiko winner’ *Sahara Reporters* (25 August 2008) <<http://saharareporters.com/2008/08/25/updated-tribunal-sacks-ondo-state-governor-olusegun-agagu-declares-mimiko-winner>> accessed 15 May 2015.

<sup>151</sup> A quick solution was achieved with the new Section 134(2) of the *Electoral Act 2010* which provides that “an Election Tribunal shall deliver its judgement in writing within 180 days from the date of the filing of the petition”. Section 134(3) of the same Act goes on to provide that “An appeal from a decision of an Election Tribunal or Court shall be heard or disposed of within 90 days from the date of the delivery of the tribunal”.

<sup>152</sup> Okechukwu Oko (n 78) 15.

<sup>153</sup> J. O’S, ‘How Nigeria’s economy grew by 89% overnight’ *The Economist* (7 April 2014) <[www.economist.com/blogs/economistexplains/2014/04/economistexplains2?fsrc=scn%2Ffb%2Fw1%2Fbl%2Fee%2Ftr%2Fhownigeriaseconomygrewby89overnight](http://www.economist.com/blogs/economistexplains/2014/04/economistexplains2?fsrc=scn%2Ffb%2Fw1%2Fbl%2Fee%2Ftr%2Fhownigeriaseconomygrewby89overnight)> accessed 10 May 2015.

astronomical growth.<sup>154</sup> Of course, one cannot rule out the fact that a number of disputes will result from this new wave of very technical transactions. The question that arises at this point is simple: can a country which does not have the physical and intellectual capacity to cater for its own domestic disputes, adequately administer the new wave of technical disputes that will arise from expected foreign investment?

The need for judicial reforms especially at this time can therefore not be over emphasized. In order to avoid a total collapse of the Nigerian judiciary, restore the confidence of the Nigerian citizenry in the judiciary, strengthen Nigeria's budding democracy and very importantly, project a formidable dispute resolution system to prospective investors, there is an urgent need for what Professor Phillip Aka refers to as "bold and persistent experimentation coupled with a willingness to adapt with respect to judicial reforms".<sup>155</sup> This should be comprehensive and not piecemeal.<sup>156</sup>

A good starting point will be to develop and encourage an open, credible and independent recruitment process as well as a merit based system in the appointment of judicial officers. The move to sanitise the judiciary must involve the appointment of only persons with the professional character and competence as Judges.<sup>157</sup> In addition and as Dr Abdullahi rightly points out, there is a "...need to diversify the pool from which judicial appointments are made in view of the declining intellectual depth and overall quality of the judgements of some Judges in Nigeria, which are conflicting."<sup>158</sup> This will not only improve the quality of work being done by the judiciary, it will by extension improve her image.

In recognition of the flawed process of appointing judicial officers in Nigeria, former Chief Justice of Nigeria, Aloma Mukhtar, in her capacity as Chairman of the National Judicial Council ("NJC") put together a revised version of the National Judicial

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<sup>154</sup>Editorial, Rebased GDP has Exposed Nigeria to Global Investors' *Nigeria Indepth* (18 April 2014) <<http://nigeriaindepth.com/2014/04/rebased-gdp-has-exposed-nigeria-to-global-investors-world-bank/>> accessed 4 June 2016.

<sup>155</sup> Phillip C. Aka (n 95) 71.

<sup>156</sup> Douglas Webb, 'Legal and Institutional Reforms, Strategy and Implementations: A World Bank Perspective' (1999) 30 *Law and Policy International Business* 16, 162.

<sup>157</sup> Wahab Egbewole and Ibrahim Imam (n 130) 44.

<sup>158</sup> Ibrahim Abdullahi, 'Independence of the Judiciary in Nigeria: A myth or reality' (2014) 2(3) *International Journal of Public Administration and Management Research* 55, 63.

Council Guidelines and Procedural Rules for the Appointment of Judicial Officers of All Superior Courts of Record in Nigeria ("the Revised Rules").<sup>159</sup> The first appointment under the Revised Rules was made on the 14<sup>th</sup> of May 2015.<sup>160</sup> While it is still too early to comment on the success of the rules, one must commend a number of introductions made by the Revised Rules into the appointment process.

The first is that it introduces and encourages a recruitment process that is open to every qualified member of the Nigerian bar. *Rule 3 of the Revised Rules* mandates any Judicial Service Commission ("JSC")<sup>161</sup> seeking to appoint new Judges, to advertise same on its website, the notice board of the concerned Court as well as through the relevant branch of the Nigerian Bar Association.<sup>162</sup> The Commission is also mandated to write to the Head of every other superior court in Nigeria as well as serving Judges within the State, asking for the nomination of suitable candidates.<sup>163</sup> This is an improvement on the former practice, which like we have previously discussed, was usually shrouded in secrecy and nepotism. By this very practice, the pool from which judicial appointments are made is widened and deepened, which if strictly adhered to, has the potential to improve the quality of the Nigerian bench.

The Chief Justice or Judge in his/her capacity as Head of the Judicial Service Commission (and in line with the former practice) is expected to shortlist from the number of applications received and forward same to the relevant Judicial Service Commission for approval.<sup>164</sup> It is submitted that the aforementioned shortlisting process is open to abuse by the Head of the Court as he/she is able to shortlist his/her cronies for approval by the Judicial Service Commission. Unfortunately the Commission is unlikely to be any wiser as the Revised Rules do not envisage the

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<sup>159</sup> The Rules came into force on the 2<sup>nd</sup> of November 2014.

<sup>160</sup> Justice Amiru Sanusi was appointed as a Justice of the Supreme Court of Nigeria on this date. See <http://www.thisdaylive.com/articles/judges-now-to-be-appointed-through-advertisement-njc/209311/> accessed 14 June 2015.

<sup>161</sup> Every State has its own Judicial Service Commission. There is also a Judicial Service Commission at the Federal level.

<sup>162</sup> Rule 3(1)(a)(i) of the Revised National Judicial Council Guidelines and Procedural Rules for the Appointment of Judicial Officers of All Superior Courts of Record in Nigeria 2014.

<sup>163</sup> Rule 3(1)(a)(ii) of the Revised National Judicial Council Guidelines and Procedural Rules for the Appointment of Judicial Officers of All Superior Courts of Record in Nigeria 2014.

<sup>164</sup> Rule 3(4) & (5) of the Revised National Judicial Council Guidelines and Procedural Rules for the Appointment of Judicial Officers of All Superior Courts of Record in Nigeria 2014.



Commission to be privy to the calibre of applications or nominations made in respect of the position. It is suggested that the process of shortlisting be made more transparent to all stakeholders or at the very least, should involve more than one individual in order to prevent abuse of power.

The Revised Rules also introduce an interview session for potential judicial officers, which is to be conducted by the National Judicial Commission. This way, the commission is able to test the applicant's knowledge of the law as well as probe to ascertain their suitability for the position of a Judge.<sup>165</sup> Anybody found to be of a questionable character is to be barred from re-applying within a space of two years.

The Revised Rules also allow members of the academia to be appointed as Judges of Superior Courts of Record. This aforementioned provision should be vigorously pursued in order to improve the intellectual capacity as well as the quality of judgements of the Nigerian bench.<sup>166</sup> This suggestion is given in light of the great development of the law that must occur in the next couple of years. There is a need to enrich the judiciary with legal professionals who possess the much needed training and experience required to take a profound and analytical view of the law.<sup>167</sup>

Notwithstanding the fact that the operation of the Federal Character in principle is fertile ground for a deficient and substandard system, it can unfortunately not be done away with in view of the multifarious nature of the Nigerian nation. The Revised Rules provide that in applying the Federal Character principle, stakeholders must ensure that the independence of the judiciary (and not necessarily the quality of personnel) is not compromised. It is opined that stakeholders in the appointment process have the duty to ensure that in the application of the Federal Character principle; only the best from each of the geographical regions in Nigeria are appointed

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<sup>165</sup> Rule 6(1) & (3) of the Revised National Judicial Council Guidelines and Procedural Rules for the Appointment of Judicial Officers of All Superior Courts of Record in Nigeria 2014.

<sup>166</sup> Some of Nigeria's foremost Judges like Professor T.O Elias, G.B.A Coker and Chief Justice Aguda were appointed from the academia to the Nigerian bench.

<sup>167</sup> Epiphany Azinge and Judith Fumnanya Rapu, 'Roadmap to Judicial Transformation: Through the Lens of Retired and Serving Jurists of the Supreme Court' (2012) <[www.nials-nigeria.org/journals/Azing%20and%20JudithRoadmap%20to%20Judicial%20Transformation.pdf](http://www.nials-nigeria.org/journals/Azing%20and%20JudithRoadmap%20to%20Judicial%20Transformation.pdf)> accessed 4 September 2014.

as judicial officers. The training, experience, personal integrity and knowledge of candidates should be given precedence over sentiments and extraneous factors.

Moving away from the Revised Rules, there is the obvious need to encourage a relevant and periodic training process for both potential and serving judicial officers. A good start may be to introduce a judicial training module at the Nigerian law school, which may very well be optional. Buhai, Kumari, Omaka et al rightly opined that “by creating a system of education that starts in law school, we can better prepare Judges”.<sup>168</sup> Judge Marc T. Amy has in fact gone as far as advocating for a special LLM programme for potential and/or prospective judicial officers.<sup>169</sup> A national training process for potential judicial officers is also an additional option.<sup>170</sup>

In India, potential and/or newly appointed Judges are expected to undergo a training process ranging between four months and one year at the Delhi Judicial Academy.<sup>171</sup> During this period, this training focuses on inculcating judicial officers with the right knowledge, attitude, skills and ethics.<sup>172</sup> This is as against the three days training session in Nigeria. Newly appointed judicial officers should be made to undergo a comprehensive training process, in order to prepare and equip them with the right skills and etiquette needed to make a good and fair Judge.

There is need for the NJI to organise and coordinate trainings at both the State and Judicial division levels, as against the present practice where training is done at the National level, with the participation of only one or two representatives from each State. Furthermore, bespoke training should be conducted for each State as they all have varying needs.<sup>173</sup> The NJI may also make use of periodic educative pamphlets that will highlight recent developments in Nigerian law and indeed other similar

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<sup>168</sup> Buhai, Kumari, Omaka et al (n 142) 199.

<sup>169</sup> Marc T. Amy, ‘Judiciary School: A proposal for a Pre-Judicial LLM Degree’ (2002) 52 *Journal of Legal Education* 130,139.

<sup>170</sup> Steven Zeidman, ‘Careful What You Wish for: Tough Questions, Honest Answers and Innovative Approaches to Appointive Judicial Selection’ (2007) 34(1) *Fordham Urban Law Journal* 473, 481

<sup>171</sup> Official website of the Delhi Judicial Academic <<http://judicialacademy.nic.in>> assessed 7 June 2015.

<sup>172</sup> Buhai, Kumari, Omaka et al (n 142) 170.

<sup>173</sup> For example, while a High Court in the Niger Delta area of Nigeria may need more training in the area of oil and gas, the High Courts in Lagos State may require more training in areas relating to international commercial law in general.

jurisdictions. The judiciary at the State level should also take up the responsibility of improving itself. In addition, Judges should be encouraged to attend international conferences and trainings.<sup>174</sup>

Very important is the need to introduce more academics into the management of the NJI as against the present practice where it is run by senior and retired Judges who themselves need further education. Professor Okechukwu Oko rightly pointed out that, “as litigation becomes increasingly complex and lawyers attain greater proficiency and sophistication as a result of technological advancements in society, it is essential that Judges be trained to cope with or match the expertise of lawyers”<sup>175</sup> An influx of vibrant law researchers and law teachers in the management of the NJI will assist them to fulfil their statutory obligation of continued education.

The Nigerian government also needs to provide an enabling environment for judicial officers. Judges are not magicians. They are human beings and they have their limits. There is a need to improve the conditions of service for members of the judiciary because as Dr Osita Ogbu rightly noted, “generous conditions of service will also attract the right calibre of men and women to the bench and reduce the tendency of corrupt practices. A person who is not financially secure is more susceptible to corruption”.<sup>176</sup> Furthermore, successful members of the bar with the right experience, knowledge and interest in joining the bench, will not be reluctant to leave their successful practices if a generous welfare package is attached to the position of a Judge. Allowing the judiciary free rein over its finances will be a step in the right direction. Furthermore, a good and regular welfare package will no doubt go a long way in the fight to eliminate corruption within the judiciary.

There is an urgent need to create more courts, appoint more Judges and provide better infrastructure. A situation where eight Judges administer fifteen thousand (15,000) cases without a recording system or electricity, is to say the least, unacceptable. There is also a need to keep proper and computerised records of incoming and outgoing

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<sup>174</sup>BBC News (n 4).

<sup>175</sup> Okechukwu Oko (n 78) 70.

<sup>176</sup> Osita Ogbu (n 1) 728.

cases especially at the State level. This is the only way to properly measure performance and by extension, improve performance.

Finally and very important to this thesis, is the need to develop and encourage the use of viable alternatives to litigation (like arbitration), in a bid to address some of the problems of the judicial system in Nigeria.<sup>177</sup> For example, it is submitted that providing a viable alternative will reduce the existing pressure on the Nigerian court.<sup>178</sup> As Dr Emilia Onyema rightly pointed out, “the inadequacies of litigation are evidenced by the congestion of their courts, which invariably leads to delays in the delivery of justice to their citizens. These inadequacies can largely be attributed to the retention of a mono-track dispute resolution process (litigation). One way of overcoming these inadequacies is the provision of a multi-track dispute resolution system which incorporates litigation and other alternative dispute resolution processes. This is based on the premise that litigation is not the only mechanism for resolving disputes.”<sup>179</sup> Dr Laibuta recently submitted that “the ensuing complexity of social economic relations was characterised by competitions and friction generating new demands, claims and wants overwhelming the conventional judicial systems which are largely viewed as outdated and incapable of expeditious and effective management and resolution of conflicts. This has resulted in a crisis in litigation hence the urgent call for strategic review and reform to recreate a competent, efficient and effective judiciary backed by ADR.”<sup>180</sup>

Using Lagos as an example, it is on record that since the introduction of the Lagos State Arbitration Law 2009 as well as the Lagos Multi-Door Court House Law 2007, which provides and encourages litigants to resolve their disputes through an alternative dispute resolution structure provided for by the State High Court,<sup>181</sup> the State’s High Court has witnessed a reduction in the number of cases filed. In statistic

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<sup>177</sup> We discuss this in more detail in Section 5.2 of Chapter Three.

<sup>178</sup> B.A Bukar, ‘Legal Framework for the Resolution of International Commercial Disputes: An examination of Nigeria’s Arbitration Laws’ (1999) 16(1) *Journal of International Arbitration* 47,48.

<sup>179</sup> Emilia Onyema, ‘The Multi-Door Court House (MDC) Scheme in Nigeria: A Case Study of the Lagos MDC’ (2013) 2(7) *Apogee Journal of Business, Property and Constitutional Law* 96.

<sup>180</sup> K.I. Laibuta, ‘ADR in Africa: Contending with Multiple Legal Orders for Wholesome Dispute Resolution’ (2016) 82(1) *Arbitration* 63, 64.

<sup>181</sup> We discuss the Lagos State Arbitration Law 2009 in more detail in Section 4.2 of Chapter Four.

released by the Lagos Island Division of the Lagos State High Court in April 2015, it was revealed that in year 2010, 2011, 2012, 2013, 2014 and January–April 2015, the court received 2585, 2322, 2052, 1207, 1592 and 490 new cases respectively.<sup>182</sup>

It is therefore not out of place to submit that providing practical and alternative methods of resolving disputes, will reduce the pressure on the Nigerian courts in general, as this will provide litigants with alternatives. The bulk of the pressure which the courts seem to carry on their own will be shared with these alternatives. At a time when Nigeria seems to be attracting a lot of foreign attention in technical and emerging areas of law, this call for alternatives cannot have been timelier. This PhD thesis therefore suggests arbitration as a viable alternative.

## CONCLUDING REMARKS

We will in the next chapter of this thesis not only justify our selection of arbitration as against mechanisms like mediation, conciliation and negotiation, we will more importantly highlight the many ways in which the arbitration mechanism makes up for some of the problems of the litigation practice, which we have highlighted in this chapter. As Lord Langdale, M.R rightly noted in the famous case of *Earl of Mexborough v Bower*,<sup>183</sup> “many cases occur in which it is perfectly clear that by means of a reference to arbitration, the real interests of the parties will be much better satisfied than they could be by any litigation in a court of justice”. For example, in addition to reducing the pressure on the Nigerian courts by providing a viable alternative to disputants, parties are able to select persons with the requisite knowledge and expertise as well as the time and integrity needed to effectively decide their dispute.<sup>184</sup> In arbitration, decision makers are careful to act with integrity as their professional success is hinged

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<sup>182</sup> See the Lagos States Court website: <[https://lagosjudiciary.gov.ng/jis\\_new/programs.aspx](https://lagosjudiciary.gov.ng/jis_new/programs.aspx)> accessed on 3 April 2015. This writer was also able to confirm the veracity of these figures during an informal visit to the Lagos State High Court in April 2015.

<sup>183</sup> (1843) 7 Beau 132.

<sup>184</sup> The benefits of arbitration especially in tackling these problems in Nigeria are discussed in more detail in Chapter Three of this thesis.

on an unblemished conduct.<sup>185</sup> Parties are also able to select all or parts of any law of their choice, thus avoiding some of the controversies associated with Nigerian law.<sup>186</sup>

It behoves stakeholders and policy makers to encourage citizens to explore arbitration, by providing the enabling environment for a successful arbitration practice. In subsequent parts of this thesis, we will critically analyse the existing domestic arbitration frameworks in Nigeria. This include the customary arbitration practice as well as the outdated Nigerian Arbitration and Conciliation Act, which was introduced in 1988. Drawing from arguments which we make in the course of this thesis, we conclude same by suggesting a more relevant and practical domestic arbitration framework for Nigeria.

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<sup>185</sup> Andrew Chukwuemerie (n 17) 11.

<sup>186</sup> We discuss this in more detail in Section 5.2 of Chapter Three.

## CHAPTER THREE

### ARBITRATION: A VIABLE ALTERNATIVE TO LITIGATION

#### INTRODUCTION

In Chapter Two of this thesis, we examined litigation as a method of resolving disputes in Nigeria. We mentioned that litigation was and still remains the traditional and principal method of resolving disputes in Nigeria. We went ahead to highlight some of the problems encountered in the administration of justice in Nigerian courts. Specifically, we discussed in detail the voluminous caseload of the Nigerian courts, which has to a large extent contributed to the delay in the administration of justice in Nigeria. We also highlighted the problems of incompetent and/or corrupt Judges as well as the lack of basic court infrastructure.

In order to tackle some of these problems, especially that of delay, commentators have advocated for the use of other viable methods of resolving disputes.<sup>1</sup> This suggestion has become pertinent in view of the rigidity and inability of the litigation mechanism to cater for the unfortunate realities.<sup>2</sup> By way of a solution to these problems therefore, we concluded Chapter Two by proposing the use of arbitration as a viable alternative to litigation; this proposal is the focus of the current chapter.<sup>3</sup>

Arbitration refers to a process in which parties agree to opt out of their right of access to the court and instead submit their dispute to a specially constituted tribunal, for a

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<sup>1</sup> R. Blench, S. Longtau, U. Hassan and M. Walsh, 'The Role of Traditional Rulers in Conflict Prevention and Mediation in Nigeria: The final report' (Report prepared for DFID 2006) 75 <[www.rogerblench.info/Conflict/TR%20Interim%20Report.pdf](http://www.rogerblench.info/Conflict/TR%20Interim%20Report.pdf)> accessed 1 December 2015. See also Adewale Olawoyin, 'Charting New Waters with Familiar Landmarks' (2009) 26(3) Journal of International Arbitration 373, 374.

<sup>2</sup> Besides, depreciation of court infrastructure will be reduced if the workload of the court is lessened.

<sup>3</sup> There are four major arbitration theories: the contractual theory, the jurisdictional theory, the hybrid theory and the autonomous theory. As Professor Bantekas noted in his book, "...all of these theories find a degree of application, although some are more prevalent than others". As we go along, we will notice that this thesis strikes a balance between parties' right to determine their dispute resolution mechanism and the role of the State in providing support for the mechanism as encapsulated in the hybrid (mixed) theory. For a more detailed discussion on the theories, see Ilias Bantekas, *An Introduction to International Arbitration* (Cambridge University Press 2015) 2-4; Julian D.M Lew, Loukas A. Mistelis, et al, *Comparative International Commercial Arbitration* (Kluwer Law International 2003) 74 -81.

final and binding decision.<sup>4</sup> The idea of arbitration is a simple one:<sup>5</sup> basically parties to an arbitration process choose to exercise a right bestowed upon them by law to determine the process by which their dispute will be administered.<sup>6</sup> They both submit their dispute to an individual or a group of individuals, whose experience, reputation and credibility they trust who then considers the facts as against parties arguments and then makes a binding and final decision on the issues in dispute.<sup>7</sup>

In this chapter, we establish the viability of the arbitration mechanism first as against popular “Alternative Dispute Resolution” (“ADR”)<sup>8</sup> mechanisms like mediation, conciliation and negotiation. For example, unlike arbitration where a person is bound by a validly executed agreement and award, parties to any of the aforementioned mechanisms can technically still resile from the result of the other mechanisms.<sup>9</sup> More important to this thesis is the fact that this chapter points out the many ways in which the arbitration mechanism makes up for the deficiencies of the judicial system in Nigeria. For example, parties to technical disputes are obviously able to avoid the incompetence associated with the court system by appointing individuals with the requisite knowledge and experience to administer their dispute.

In terms of structure, this chapter is divided into five major parts. In the first part, we briefly examine the history as well as the arguments surrounding the origin and development of arbitration in general. We argue that arbitration developed in

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<sup>4</sup> Jan Paulsson, *The Idea of Arbitration* (1<sup>st</sup> edition, Oxford University Press 2013) 1; Olakunle Orojo and Ayodele Ajomo, *Law and Practice of Arbitration in Nigeria*, (Mbeyi and Associates (Nig) Ltd, 1999); Paul Idornigie, ‘The Relationship Between Arbitral and Court Proceedings in Nigeria’ (2002) 19(5) *Journal of International Arbitration* 443; Janet A. Rosen, ‘Arbitration Under Private International Law: The Doctrine of Separability and Competence de la Competence’ (1993-1994) 17 *Fordham International Law Journal* 599; Paul Idornigie, ‘The 1988 Nigerian Arbitration and Conciliation Act: Need For Review’ (2003) 6(3) *International Arbitration Law Review* 50,57.

<sup>5</sup>Nigel Blackaby et al, *Redfern and Hunter on International Arbitration* (6<sup>th</sup> Edition, Oxford Press, 2015)1-2

<sup>6</sup> Thomas E. Carbonneau, ‘The Exercise of Contractual Freedom in the Making of Arbitration Agreements’ (2003) 36 *Vanderbilt Journal of Transnational Law* 1189,1193; Alison Overby, ‘Arbitrability of Disputes Under the Federal Arbitration Act’ (1985-1986) *Iowa Law Review* 1137, 1146

<sup>7</sup>Nigel Blackaby et al (n 5) 1-2.

<sup>8</sup> We acknowledge the controversy as to whether arbitration is an ADR mechanism. For the purpose of this thesis (except where otherwise stated), we adopt the practical approach by referring to ADR as any other mechanism apart from litigation, which can be used to resolve disputes.

<sup>9</sup> Admittedly they may be liable to pay damages. The court also has the discretion to grant the equitable specific performance order especially in situations where the court is of the opinion that damages may not be sufficient.



response to the deficiencies of the court system.<sup>10</sup> Specifically, we disagree with the suggestion in some academic quarters that the very first arbitration proceeding can be traced to the Biblical story of King Solomon and the two warring mothers. This is in view of the nature of the King's powers in those days, which included judicial functions, as well as the lack of parties' consent in such arrangements. Instead we adopt the argument that the exact origin of arbitration has been lost in history.

In order to properly define the scope of arbitration, Part Two of this chapter goes ahead to identify the other ADR methods and in Part Three, we submit that arbitration is the most viable of the available options and adduce reasons in support of this position.<sup>11</sup> In Part Four, this writer argues that the concept known as ADR has since lost its relevance and that it is in fact incorrect practice to continue to label a particular set of dispute resolution mechanisms as "ADRs" when in actual fact, and depending on the angle from which one views it, all the known methods of dispute resolution, including litigation, are in one way or another alternatives to another method. Gone are the days when the court system was the principal method of resolving all types of disputes. Today, the principal method of resolving disputes depends to a large extent on the nature of the dispute in question.<sup>12</sup> We argue that by implication, the definition of ADR is not fixed as it to a large extent depends on the nature of the dispute in question. Indeed, the dispute resolution process has evolved from a one size fits all regime (litigation) to a more flexible regime where the principal method of resolving disputes depends on the nature and issue in question.

We however argue that assuming, without conceding, that litigation still remains the principal method of resolving all types of dispute, the dispute resolution procedure in many jurisdictions has evolved from the idea of an "either/or" practice, which the word alternative seems to imply, to a more inclusive and complementary process,

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<sup>10</sup> This justifies our approach in this thesis as it shows that arbitration has been successfully used to tackle the problems of the court system.

<sup>11</sup> We acknowledge the argument in some quarters as to whether or not arbitration is an ADR. While we agree that arbitration is in many respects different from ADR mechanisms like mediation, negotiation and conciliation; for the purposes of this thesis, we adopt the pragmatic approach by defining ADR as any other mechanism apart from the most commonly used method, litigation.

<sup>12</sup> For example, arbitration has been said to be the principal method of resolving international commercial disputes. See Nigel Blackaby et al (n 5) 1.

since it is in fact impossible to undertake the litigation process without a resort of some sort to the so called ADR mechanisms.<sup>13</sup> In other words, the Rules of Civil Procedure in many jurisdictions of the world have adopted an approach that incorporates these so-called ADR procedures into the litigation process, and so they are in reality no longer strict alternatives but complementary to litigation.

In Part Five, we discuss the inability of the litigation process to adapt to the evolving realities both in Nigeria and beyond, as well as highlight how the arbitration practice has been able to make up for the inadequacies of the litigation process, especially as it relates to some of the problems discussed in Chapter Two.

## 1.0 BACKGROUND

It is difficult to state the origin of arbitration with exact certainty. According to Earl Wolaver, "...what time or place man first decided to submit to his chief or to his friends for a decision and a settlement with his adversary, instead of resorting to violence and self-help, or to the public legal machinery available, is not known..."<sup>14</sup> It will seem that the practice originated in response to developments within the society<sup>15</sup> and its origin dates as far back as over a thousand years.<sup>16</sup> Henry de Vries has opined that resolving disputes by agreeing to abide by the decision of a third party has existed long before law was established, courts were organised or Judges had formulated principles of law.<sup>17</sup>

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<sup>13</sup> As we will come to see, the civil procedure in many jurisdictions mandate parties to explore ADR procedures before instituting court actions. This position is based on the notion that many of the court actions which can be resolved by mediations or negotiations are clogging the courts list. This no doubt will be an effective way of decongesting the courts if successful. The problem however with this approach is that you cannot force parties who are unwilling to compromise, to negotiate and so while you may be able to force them to initiate negotiation proceedings, this does not in any way guarantee the success of the process.

<sup>14</sup> Earl S. Wolaver, 'The Historical Background of Commercial Arbitration' (1934) 83 U.pa. L.Rev 132

<sup>15</sup> Micheal Lord Mustill, 'Arbitration: History and Background' (1989) 6 (2) Journal of International Arbitration 1.

<sup>16</sup> Pierre A. Karrer (ed), *Introduction to International Arbitration Practice* (Kluwer Law International 2014) 233; Lucy Greenwood, 'The Rise, Fall and Rise of International Arbitration: A view from 2030' (2011) 77 Arbitration 435 (Published by Sweet and Maxwell).

<sup>17</sup> Henry P. de Vries, 'International Commercial Arbitration: A Transnational View' (1984) 1(1) Journal of International Arbitration 7.

Several writers<sup>18</sup> have made attempts to pin down the first arbitration proceeding to the Biblical story of King Solomon and the two mothers.<sup>19</sup> However, this assertion cannot be true for many reasons. For one, it is clear from a general perusal of historical records as presented in the Holy Bible that Kings in those days exercised ultimate authority within their jurisdiction.<sup>20</sup> Unlike what proponents of this theory seem to suggest, the King had inherent judicial powers and functions.<sup>21</sup> He was the Supreme Court of the land and had the duty to maintain peace<sup>22</sup> as well as to administer justice within his territory.<sup>23</sup> By virtue of his position, the King possessed and exercised mandatory jurisdiction (equivalent to that of the modern court) over his subjects. By implication of this jurisdiction, parties had no choice but to submit to the King's Court when the circumstances demanded, therefore the much needed consent required to validate arbitration was lacking here.

Other writers seem to have rightly concluded that the exact origin of this very successful practice has been lost in history<sup>24</sup> and so have instead limited their discussions on this issue to specific jurisdictions.<sup>25</sup> There is however evidence which suggests that arbitration existed from as early as 350 BC; Plato is quoted to have stated that "wherever someone makes a contract and fails to carry it out...an action may be brought to the tribal courts if the parties have been unable to resolve it before

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<sup>18</sup>Frank D. Emerson, 'History of Arbitration Practice and Law' (1970) 19 Clev St L. Rev 155; Grace Xavier, 'Evolution of Arbitration as a Legal Institutional (sic) and the inherent powers of the Court: Putrajaya Holdings SDN, BHD v. Digital Green SDN. BHD' (Asian Law Institute Working Paper, No. 009, December 2009).

<sup>19</sup> An account of this story can be found in 1<sup>st</sup> Kings 3: 16-28 of the Holy Bible (King James Version).

<sup>20</sup> *ibid* 1 Samuel 8; 11-18.

<sup>21</sup> *ibid* 1 Samuel 8; 5; 1 Samuel 9: 15-17 and 1King 3:9.

<sup>22</sup> *ibid* 1 Samuel 8; 11-12.

<sup>23</sup> *ibid* Proverbs 20; 8.

<sup>24</sup>Earl S.Wolaver (n 14) 235.

<sup>25</sup> For a detailed discussion on the development of arbitration in England, France, USA, Germany, amongst others, see Gary Born, *International Arbitration: Cases and Materials* (2<sup>nd</sup> Edition, Kluwer Law International 2015) 14-25. See also O. Ezediaro, 'Guarantee and incentives for Foreign Investment in Nigeria' (1971) 5 International law 770, 775; Grace Xavier, 'Evolution of Arbitration as a Legal Institutional (sic) and the inherent powers of the Court: Putrajaya Holdings SDN, BHD v. Digital Green SDN. BHD' (Asian Law Institute Working Paper, No. 009, December 2009); Frank D. Emerson, 'History of Arbitration Practice and Law' (1970) 19 Clev St L. Rev 155 (1970).

arbitrators or neighbours”.<sup>26</sup> There is also evidence that shows arbitration being used to administer commercial disputes from as far back as 1249 AD.<sup>27</sup>

Notwithstanding these varied accounts, one thing is undisputed and that is that arbitration emerged mainly in response to the inadequacies of the State-run dispute resolution system.<sup>28</sup> Lord Mustill puts it very nicely when he opines that “the official system was too slow; the dispute could not always wait for the justiciar to arrive on circuit, or for the lord to return from the wars. It was too expensive; there would be court fees or stamp duties to pay, and a formalised legal system invariably breeds professional lawyers, who have rarely undercharged. Its methods were unsuitable; compurgation and trial by battle could not yield reliable results where the issues concerned transactions rather than truth. The proceedings were public, a feature which traders have never cared for. The tribunal would often lack the necessary qualifications. Judges who were admirable for dispensing public justice might be incapable for reasons of temperament and upbringing, or unfitted by unfamiliarity with current practice to rule on questions involving the technicalities of trade. Moreover, the impartiality of the tribunal could not be guaranteed, particularly if one of the parties was a stranger.”<sup>29</sup> From the foregoing, it is safe to state that the role of the State in the initial arbitration practice was limited; it was a self-help mechanism of some sort used to mitigate the problems of the court system. This explains the continued emphasis on party autonomy in the modern version of the practice. In addition, it is clear that the idea of successfully using arbitration to address the problems of the court system (which is our approach in this thesis), is well founded and rooted in history.<sup>30</sup>

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<sup>26</sup> Albert Fiadjoe, *Alternative Dispute Resolution: A Developing Worlds Perspective* (Cavendish Publishing Limited 2004) 2.

<sup>27</sup> ICCA, ‘Historic Documents in Arbitration’ [www.arbitration-icca.org/historic-treasures/historic\\_documents.html](http://www.arbitration-icca.org/historic-treasures/historic_documents.html) accessed 12 September 2014.

<sup>28</sup> Lord Micheal Mustill, ‘Arbitration: History and Background’ (1989) 6 (2) *Journal of International Arbitration* 1.

<sup>29</sup> *ibid.*

<sup>30</sup> For this to work however, the government needs to ensure that it is tailored or well suited to the jurisdiction in question. The question of checking suitability did not apply in the older days because the practice itself arose from among the people and their practices.

As we come to see later in this chapter, many of these problems became more apparent and perhaps unbearable with the development of international trade, which in turn led to the interaction between people from different jurisdictions. International trade also resulted in competition, the development of new and sophisticated transactions, which in turn resulted in technical disputes. It soon became pertinent that people with specialized knowledge of the subject area in dispute administer same. Furthermore, time suddenly became of essence.<sup>31</sup>

Jean-Francois Guillemain opined that “conflict is an integral part of business life. It arises in the course of most business operations, during negotiation and performance of agreements, and as part of the interrelation between various contracts which deal with the same overall project, but which have perhaps been entered into by other parties and are governed by other legal systems or contractual terms”.<sup>32</sup> Mustill also noted that “successful trade must have a means of dispute resolution other than force. From the start, it must have involved a neutral determination and an agreement, tacit or otherwise, to abide by the result, backed by some kind of sanction.”<sup>33</sup> In order to ensure the economic development of the State and its people as well as to prevent the breakdown of law and order, it was and is still necessary to ensure the availability of a successful dispute resolution process.<sup>34</sup>

As soon as society became sufficiently complex and the social units became large enough to give room for alternatives, parties began to explore other methods of resolving their dispute, resulting in the rise and spread of what is now known as

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<sup>31</sup> For example, disputes arising from the carriage of perishable goods by sea could not afford to be left indefinitely.

<sup>32</sup> Jean-Francois Guillemain, ‘Reasons for Choosing Alternative Dispute Resolution’ in Jean-Claude Goldsmith, Arnold Ingen-Housz et al (eds) *ADR in Business Practices and Issues across Countries and Cultures* (Kluwer Law International 2006) 23.

<sup>33</sup> Micheal Lord Mustill, ‘Sources for the History of Arbitration, Arbitration International’ (1998) 14 (3) *LCIA: Kluwer Law International* 235.

<sup>34</sup> Initially, awards were enforced through communitarianism norms, but as society became more sophisticated and the use of arbitration expanded, the state had to get involved. See Richard C. Reuben, ‘Towards a State Action Theory of Alternative Dispute Resolution’ (1997) 85(3) *California Law Review* 577,599.

arbitration.<sup>35</sup> Even though the courts were initially threatened by the emergence and growth of arbitration, they have come to accept the practice with time.<sup>36</sup>

## 2.0 MODERN DISPUTE RESOLUTION MECHANISMS

### 2.1 A Brief Overview

Notwithstanding our discussion on the development of arbitration, the State-run system which is now known as litigation remains the traditional method of resolving domestic disputes in many jurisdictions. In fact, it is seen in many jurisdictions as the superior method of resolving civil disputes.<sup>37</sup> It has also been referred to as the most obvious dispute resolution method,<sup>38</sup> as it involves the resolution of disputes through apparatuses provided by the State.<sup>39</sup>

Julian D.M Lew, Loukas A. Mistelis, et al rightly submitted that it involves the “manifestation of State power and the responsibility of the State to ensure that courts exist, that appropriately qualified Judges are appointed, that there are procedural rules to regulate the basis of jurisdiction and the conduct of cases before the court.”<sup>40</sup> In other words, unlike the other methods of dispute resolution, which as we will soon see revolve around party cooperation and require the active participation of both parties to initiate and in some other cases to conclude, litigation requires the active involvement of the State and its apparatuses as well as the compulsory jurisdiction of the State.<sup>41</sup>

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<sup>35</sup> *ibid.*

<sup>36</sup> Ernest Lorenzen, ‘Commercial Arbitration-International and Interstate Aspects’ (1934) Yale Law School Scholarship Series, Paper 4588 <[http://dogotalcommons.law.yale.edu/fss\\_papers/4588](http://dogotalcommons.law.yale.edu/fss_papers/4588)> 716,717; Herbert Syme, ‘Arbitrability of Labour Disputes’ (1951) 5(3) Rutger Law Review 45, 458; Janet Rosen, ‘Arbitration under Private International Law: The Doctrine of Seperability and Competence de la Competence’ (1994) 17(3) Fordhams International Law Journal 599, 617; V.S Deshpande, ‘How International Arbitration can always Prevail over Litigation’ (1987) 4(4) Journal of International Arbitration 9.

<sup>37</sup> Susan Blake et al, *A practical approach to Alternative Dispute Resolution* (Oxford University Press 2011) 3.

<sup>38</sup> Julian D.M Lew, Loukas A. Mistelis et al, *Comparative International Commercial Arbitration* (Kluwer Law International 2003) 4.

<sup>39</sup> We discussed this method as it operates in Nigeria in Chapter Two of this thesis.

<sup>40</sup> Julian D.M Lew (n 38) 4.

<sup>41</sup> Admittedly, this is subject to the right of parties to opt for other ADR methods.

Apart from litigation, we also have other methods of dispute resolution which have developed over time. These methods include mediation, negotiation, conciliation and of course arbitration. We similarly have other methods like the Med-Arb, which fall into a hybrid category. All of these methods are popularly known under the umbrella heading of Alternative Dispute Resolution.<sup>42</sup> Early advocates of ADR include the former American President Abraham Lincoln, who is quoted to have said that “discourage litigation. Persuade your neighbours to compromise whenever you can. Point out to them how the nominal winner is often the loser in fees, expenses and cost of time”.<sup>43</sup> This is possible because of the non-contentious approach of ADR systems.<sup>44</sup>

Apart from arbitration,<sup>45</sup> the most popular of the other ADR mechanisms is said to be mediation.<sup>46</sup> In a mediation proceeding, parties appoint a third party, known as a mediator, to manage and resolve their conflict by helping them arrive at a mutually acceptable position.<sup>47</sup> The mediator does not therefore issue any form of binding decision.<sup>48</sup> According to Paul Newman, the mediator assists the parties to focus on their real interests and strengths as opposed to their emotions, in an attempt to draw them together towards possible settlement”.<sup>49</sup>

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<sup>42</sup> Simon Roberts, ‘Mediation in the Lawyers Embrace’ (1992) 55(2) *The Modern Law Review* 258; Robert Mnookin, ‘Alternative Dispute Resolution: An Economic Analysis’ (1998) Harvard Law School, John M. Olin Centre For Law, Economics and Business Discussion Paper Series, Paper 232, 1; Alexander Bevan, *Alternative Dispute Resolution* (Sweet & Maxwell 1992) 1; Richard C. Reuben, ‘Towards a State Action Theory of Alternative Dispute Resolution’ (1997) 85(3) *California Law Review* 577,581; Jenkins, *International Construction Arbitration Law* (2<sup>nd</sup> edn, Wolters Kluwer 2014), Brown and Marriott, *ADR Principles and Practice* (3<sup>rd</sup> edn, Sweet & Maxwell/Thomson Reuters, 2011), Boulle and Nesic, *Mediation Principles, Process and Practice* (Butterworths, 2001), Newmark and Monaghan, *Butterworths Mediators on Mediation* (Tottel, 2005), Kendall Freedman and Farrel, *Expert Determination* (4<sup>th</sup> edn, Sweet & Maxwell 2008).

<sup>43</sup> See <[www.abrahamlincolnonline.org/lincoln/speeches/lawlect.htm](http://www.abrahamlincolnonline.org/lincoln/speeches/lawlect.htm)> accessed 18 March 2015

<sup>44</sup> This point may not apply to arbitration, which is every bit as contentious as litigation.

<sup>45</sup> For a definition of arbitration, please refer to the introductory section of this thesis.

<sup>46</sup> For a detailed and comparative discussion on mediation, see Nadja Alexander (ed), *Global Trends in Mediation* (2<sup>nd</sup> edn, Kluwer Law International, 2006); Jay Folberg, ‘A Mediation Overview: History and Dimension of Practice’ (1983) 1 *Mediation Quarterly* 3; Nadja Alexander, *International and Comparative Mediation* (Kluwer Law International, 2009).

<sup>47</sup> United Nations Guidance for Effective Mediation, <[www.un.org/wcm/webdav/site/undpa/shared/undpa/pdf/UN%20Guidance%20for%20Effective%20Mediation.pdf](http://www.un.org/wcm/webdav/site/undpa/shared/undpa/pdf/UN%20Guidance%20for%20Effective%20Mediation.pdf)> accessed 23 October 2014.

<sup>48</sup> For detailed reading on mediation within the United Kingdom, United States, China amongst others, see Association for International Arbitration (ed), *The New EU Directive on Mediation: First Insights* (Maklu 2008).

<sup>49</sup> Paul Newman, *Alternative Dispute Resolution* (CLT Professional Publishing Ltd, 1999) 9.

William E. O'Brian rightly noted that mediation proceedings especially at the initial stages of the dispute might actually help to prevent a prolonged litigation proceeding since in the process of mediating; parties are also able to realistically assess the strengths and weaknesses of their case as against that of the other party.<sup>50</sup> Admittedly such an assessment may also make a party determined to litigate if he realises that he has a better case and that he can secure a better deal at trial.<sup>51</sup>

Conciliation is in many ways very similar to the mediation process. In fact some people categorize mediation and conciliation under the general umbrella of mediative processes.<sup>52</sup> According to Susan Blake et al, "the mediation process is more likely to involve some level of helping the parties to evaluate their cases, while conciliation is more likely to be purely facilitative in helping parties to reach agreement on disputed issues".<sup>53</sup> Paul Newman opines that a "conciliator may be more interventionist than a mediator, and the accompanying process less structured, but he still endeavours to bring disputing parties together and to assist them to focus on the key issues".<sup>54</sup>

Negotiation on the other hand is an informal process in which parties' meet to discuss areas of conflict, in a bid to reach a mutually agreeable outcome.<sup>55</sup> It usually involves parties making offers, rejections and counter offers. The end result of a negotiation is usually a mutually agreed compromise between the parties.<sup>56</sup>

An escalation clause or hybrid practice, which combines multiple mechanisms in one dispute resolution clause has also emerged.<sup>57</sup> For example, we have the Med-Arb

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<sup>50</sup> William E O'Brian Jr, 'Lessons For the European Union From Mediation in the United States' in Association for International Arbitration (ed), *The New EU Directive on Mediation: First Insights* (Maklu, 2008) 59.

<sup>51</sup> The development, awareness and practice of mediation has to a large extent been boosted by the new ICC Mediation Rules 2014. The EU has also in 2008 released the Directive 2008/52/EC to encourage the use of mediation within the EU. See Philippe Billiet and Ewa Kurlanda, 'An Introduction to the Directives on Certain Aspects of Mediation in Civil and Commercial Matters' in Association for International Arbitration (ed), *The New EU Directive on Mediation: First Insights* (Maklu, 2008) 9.

<sup>52</sup> Albert Fiadjoe (n 26) 22.

<sup>53</sup> Susan Blake et al, *A practical approach to Alternative Dispute Resolution* (Oxford University Press, 2011) 31.

<sup>54</sup> Paul Newman (n 49) 3.

<sup>55</sup> Simon Roberts, 'Alternative Dispute Resolution and Civil Justice: An Unresolved Relationship' (1993) 56(3) *The Modern Law Review*, 452; Collins Namachanja, 'The Challenges facing arbitral institutions in Africa' (2016) 82(1) *Arbitration* 44, 45.

<sup>56</sup> Albert Fiadjoe (n 26) 38.

<sup>57</sup> Ilias Bantekas (n 3) 9-10.



mechanism, which merges the mediation and arbitration practice into one mechanism.<sup>58</sup> This practice usually requires parties to insert a dispute resolution clause into their contract, with the effect that parties must first explore mediation proceedings, after which parties may proceed to a full-fledged arbitration process if the former process fails.<sup>59</sup> This process may also be inverted in the sense that the disputants present their case to an arbitrator who mid-way into the proceedings, assumes the role of a mediator. Another approach is to use the mediation aspect of the mechanism to resolve issues which can easily be resolved by parties' agreement, while using the arbitration aspect of the mechanism for intractable disputes.<sup>60</sup> This hybrid method raises ethical issues, which are dealt with later on in this thesis.<sup>61</sup>

## 2.2 Factors that have contributed to the Rise of ADR

Many commentators have argued that the continued development of ADR is a response to problems encountered in the litigation process.<sup>62</sup> Not only is litigation expensive, time consuming and chequered with unnecessary delays,<sup>63</sup> it many times falls short of the required level of fairness. Alexander Bevan submits that "...the lack of fairness from various factors; poor, unspecialised or idiosyncratic judging can make the result a lottery depending on arbitrary points. If one party has a restricted purse, then the contest is immediately weighed against him. The richer party can pay for more skilled lawyers to exploit the intricacies of the system or simply hang on longer...Finally, delay is exacerbated by the poor communication engendered in turn by the combat mentality of litigation...Alternative Dispute Resolution (ADR) is a term

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<sup>58</sup> For a discussion on hybrid mechanisms, see William H. Ross and Donald E. Colon, 'Hybrid Forms of Third Party Dispute Resolution: Theoretical Implications of Combining Mediation and Arbitration' (2000) 25 *The Academy of Management Review* 416; Robert Mnookin, 'Alternative Dispute Resolution: An Economic Analysis' (1998) Harvard Law School, John M. Olin Centre For Law, Economics and Business Discussion Paper Series, Paper 232, 1, 10.

<sup>59</sup> This system is popularly referred to as Med-Arb, a model draft of this clause can be found in the Mediation rules of the ICC <[www.iccwbo.org/products-and-services/arbitration-and-adr/mediation/rules/](http://www.iccwbo.org/products-and-services/arbitration-and-adr/mediation/rules/)> accessed 23 October 2014.

<sup>60</sup> Paul Newman (n 49) 68.

<sup>61</sup> See Section 1.1.2 of Chapter Six.

<sup>62</sup> Henry T. Edwards, 'Alternative Dispute Resolution: Panacea or Anathema' (1986) 99(3) *Harvard Law Review* 668; 'Dispute Resolution' (1979) 88 (5) *The Yale Law Journal* 905, 907

<sup>63</sup> Zeb-Michael Curtis, 'Rethinking Prima Paint Separability in Today's Changed Arbitration Regime: The case for Inseparability and Judicial Decision Making in the Context of Mental Incapacity Defences' (2004-2008) 90 *IOWA Law Review* 1905, 1910.

which refers to various procedures developed...in an attempt to overcome some of the weaknesses in the litigation..."<sup>64</sup> Ironically like Susan Blake et al rightly noted, within the very strength of the litigation mechanism lies weaknesses. In a bid to be fair, the law and rules of procedure have become complex, thus extending the time and cost of court actions.<sup>65</sup>

Albert Fiadjoe also submits that "one of the main driving forces towards ADR is public dissatisfaction with litigation. It is not a secret that the search for alternatives to the adjudication model through courtroom litigation has been fuelled by the growing client dissatisfaction with traditional legal methods".<sup>66</sup> We have seen in Chapter Two that the efficiency of the court system in Nigeria has been hampered by factors like lengthy industrial actions, delay and incompetent staff, with litigants being the ultimate losers in the whole process, thus emphasising the need for alternatives.<sup>67</sup>

Jean-Francois Guillemin is however right to add that there is no single explanation for the growing popularity of ADR, "not even the convenient or simplistic argument that ADR is a way of avoiding a lengthy, complex and costly litigation..."<sup>68</sup> In other words, the emergence and development of ADR is as a result of factors beyond the failings of litigation. Carita Wallgren-Lindholm also submits that "increased interest in ADR can hardly be interpreted at this point as a passing trend or merely as a response to negative factors attached to litigation, such as length and cost of legal proceedings...One reason for ADR being considered by the business community as an increasing alternative complement to litigation is that there are many situations today where the true object of a commercial dispute is not adequately resolved by a

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<sup>64</sup> Alexander Bevan, *Alternative Dispute Resolution* (Sweet & Maxwell 1992) 1.

<sup>65</sup> Susan Blake et al (n 37) 6.

<sup>66</sup> Albert Fiadjoe (n 26) 8; See also Richard C. Reuben, 'Front Options, Consent to Arbitration, and the Demise of Separability: Restoring Access to Justice For Contracts with Arbitration Provisions' (2003) 56 SMU Law Review 819,822.

<sup>67</sup> See also Austen Sarat, 'Alternative Dispute Resolution: Wrong Solution, Wrong Problem' (1988) 37(1) Proceedings of the Academy of Political Science 162, 163.

<sup>68</sup> Jean-Francois Guillemin (n 32) 21.

court ruling..."<sup>69</sup> Under any of the ADR mechanisms however, parties are able to tailor their proceeding to suit the needs of their dispute.<sup>70</sup>

For example, parties are able to design a dispute resolution mechanism that fits nicely around the contours of specialised transactions like Islamic Finance.<sup>71</sup> In addition, in modern times, commercial relations have the tendency to develop into real relationships, which many times extend beyond the contractual relationship between the parties.<sup>72</sup> Parties to a large extent therefore want to avoid the irretrievable break down of their relationship, which results from the winner-takes-all approach of the court system.<sup>73</sup> In addition, in Nigeria for example, local parties are said to be reluctant to participate in litigation proceedings<sup>74</sup> because it is believed that litigants can never be friends after litigation.<sup>75</sup> It has therefore proven to be useful in community issues where it is important to preserve the relationship between parties.<sup>76</sup>

Despite the varying but to a large extent valid arguments made to explain the development of ADR, one thing is clear and that is "...conflict resolution, through the processes of negotiation, mediation and arbitration, has become an acceptable and, indeed, inevitable part of creative lawyering in the 21<sup>st</sup> century...Today ADR processes are being applied worldwide to a universality of situations hitherto governed by litigation...From business controversies to labour management disputes, ADR is becoming the preferred choice for the resolution of conflict and disagreement..."<sup>77</sup> ADR mechanisms have proven to be particularly useful in

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<sup>69</sup>Carita Wallgren-Lindholm, 'ADR and Business' in Gerald H. Pointon, Arnold Ingen-Housz et al (eds), *ADR in Business and Issues across Countries and Cultures* (Kluwer Law International 2006) 3.

<sup>70</sup> Robert Mnookin, 'Alternative Dispute Resolution: An Economic Analysis' (1998) Harvard Law School, John M. Olin Centre For Law, Economics and Business Discussion Paper Series, Paper 232, 1.

<sup>71</sup> Aisha Nadar, 'Islamic Finance and Dispute Resolution: Part 2' (2009) 23(2) *Arab Law Quarterly* 181,192.

<sup>72</sup> Walter Mattli argues that parties in long term relationships have a strong preference for settling disputes through ADR; See Walter Mattli, 'Private Justice in a Global Economy: From Litigation to Arbitration' (2001) 55(4) *International Organisation* 919, 934.

<sup>73</sup> Anthony Ogin, Michael Jones-Lee et al, 'Evaluating Alternative Dispute Resolution: Measuring the Impact of Family Conciliation on Costs' (1990) 53(1) *The Modern Law Review*, 57.

<sup>74</sup> Andrew Chukwuemerie, 'Salient Issues in the Law and Practice of Arbitration in Nigeria' (2006) 14 *African Journal of International and Comparative Law* 1,16.

<sup>75</sup> There is a Yoruba proverb that says '*Aa Kii ti Kootu de dore*' translated; 'Friends who go to court never return as friends'.

<sup>76</sup> G.B.A Coker, *Family Property among the Yorubas* (Sweet and Maxwell 1966) 58.

<sup>77</sup> Albert Fiadjoe (n 26) 1.

situations where, for example, parties have and want to maintain a commercial relationship, since both parties have a mutual interest in the quick resolution of the dispute.<sup>78</sup> These mechanisms are also useful in instances where neither party wishes to have the publicity associated with litigation,<sup>79</sup> as well as many other situations.<sup>80</sup> Needless to say, at the root of every ADR procedure is parties' intention to resolve their dispute via the said mechanism.<sup>81</sup>

### **3.0 ARBITRATION: THE MOST VIABLE ADR**

Arbitration remains the most viable, effective and practical ADR mechanism, especially in relation to commercial disputes.<sup>82</sup> In this part of the chapter, we will be adducing reasons in support of this assertion. This section therefore justifies our selection of arbitration (as against the other ADRs) as a viable alternative to litigation.

A fundamental difference between arbitration and the other ADR mechanisms, and from which the viability of the arbitration mechanism over the other mechanisms stems, is the involvement of the law in the process and administration of arbitration. Many countries provide legal frameworks expected to govern any arbitration involving their jurisdiction.<sup>83</sup> For example, the validity of a party's arbitration agreement and claim is determined through the lens of these said frameworks.

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<sup>78</sup> Janet A. Rosen, 'Arbitration Under Private International Law: The Doctrine of Separability and Competence de la Competence' (1993-1994) 17 *Fordham International Law Journal* 599,600; Richard Hill, 'Non-Adversarial Mediation' (1995) 12 (4) *Journal of International Arbitration* 135,137.

<sup>79</sup> Robert Mnookin (n 70) 3.

<sup>80</sup> Paul Newman (n 49) 29.

<sup>81</sup> Kenji Tashiro, 'Conciliation or Mediation during the Arbitral Process- A Japanese View' (1995) 12(2) *Journal of International Arbitration* 119,120.

<sup>82</sup> Kaj Hober and Annette Magansson, 'The Special State of Agreements to Arbitrate- The Separability Doctrine: Mandatory Stay of Litigation' (2008) 2 *Dispute Resolution International* 56,57.

<sup>83</sup>In fact, as we will come to see in subsequent chapters, institutions like the United Nations have introduced model laws which embody some of these conclusions and from which many jurisdictions can take a cue.

By virtue of the doctrine of party autonomy,<sup>84</sup> parties have full control over their proceedings.<sup>85</sup> This is said to be one of the major selling points of the arbitration mechanism.<sup>86</sup> They are able to choose the legal system, or even the parts of a legal system that is most favourable to their transaction, thereby avoiding the rigidities associated with the strict application of a particular law.<sup>87</sup> In other words, parties are not only able to choose different laws to govern their head contract and arbitration agreement respectively; they are also able to specify the aspects of the law that may apply.<sup>88</sup> For instance, parties are able to choose to apply English law to their dispute, while also excluding the operation of the English Conflict of Laws rule. They may on the other hand decide to allow their arbitrators decide their dispute strictly by the rules of what is deemed to be fair and equitable as against the provisions of the law.<sup>89</sup> This is in contrast to many of the other ADR practices, which mostly revolve around facts and/or compromises of the parties. Parties to arbitration proceedings are therefore able to get the best of both worlds: the flexibility that defines ADR proceedings as well as the certainty that comes with the application of the law in litigation, if they so choose.

Certain core practices and principles have also been established and codified, which distinguish arbitration from the other dispute resolution mechanisms.<sup>90</sup> Taking this point from the very beginning, parties' decision to opt for any of the ADR proceedings

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<sup>84</sup> The doctrine of party autonomy has been said to be the cornerstone of arbitration. It is the right of parties to opt for arbitration as well as determine the process of their arbitration proceeding. See Christopher Lau and Christen Horlack, 'Party Autonomy-The turning Point' (2010) 4 *Dispute Resolution International* 121; Thomas E. Carbonneau, 'The Exercise of Contractual Freedom in the Making of Arbitration Agreements' (2003) 36 *Vanderbilt Journal of Transnational Law* 1189,1193; Collins Namachanja, 'The Challenges facing arbitral institutions in Africa' (2016) 82(1) *Arbitration*, 44, 45; Alison Overby, 'Arbitrability of Disputes Under the Federal Arbitration Act' (1985-1986) *Iowa Law Review* 1137, 1146.

<sup>85</sup> Walter Mattli (n 72) 925.

<sup>86</sup> Ehin Omereghi, 'Taking Evidence in International Arbitration' (2015) 20(2) *Coventry Law Journal* 1,7

<sup>87</sup> Lord Collins of Mapesbury, et al, *Dicey, Morris and Collins on the Conflicts of law* (15<sup>th</sup> edn, Sweet & Maxwell 2012) para 16.006.

<sup>88</sup> By virtue of Article 3 of the Rome 1 Regulation, this is also possible in litigation. In other words, parties are able to choose the law that will be applicable to either all or part of their contract. However unlike arbitration, in litigation, parties are unable to choose non-State law to apply to their contract.

<sup>89</sup> For example, Section 21(3) of the Nigerian Arbitration and Conciliation Act allows arbitrators decide disputes in line with what is considered fair and just.

<sup>90</sup> Admittedly there seems to be a rise in the number of mediation frameworks. Some examples are the ICC Mediation Rules 2014 and EU Directive 2008/52/EC.

is, in theory, binding on all the parties. The English courts in *Cott v Barber*<sup>91</sup> have for example held that it will recognize any agreement reached by parties to resolve their dispute via any mechanism of their choosing.<sup>92</sup>

In practice however, we see that with the exception of arbitration, parties can in fact avoid and/or frustrate a pre-agreed contract to resolve their dispute via any of the ADRs since, as Carita Wallgren-Lindholm noted, all the parties must “be willing to commit themselves fully to the process and provide the neutral with relevant information.”<sup>93</sup> No wonder Jean-Francois Guillemain opines that “the key players in ADR are therefore not the neutrals, legal adviser, witnesses or any of the other people usually involved in litigation, but the parties themselves”.<sup>94</sup> A party to a mediation, conciliation or negotiation proceeding is therefore able to frustrate the process by making unnecessary or unreasonable demands in a bid to encourage a deadlock. So while technically parties may be bound by their agreement to resolve their dispute, they cannot be forced to complete the process if they choose not to do so.<sup>95</sup> This is because the aforementioned agreement is an obligation to attempt to reach a compromise and not in reality an obligation to actually reach a compromise.

This is in contrast to arbitration, where the framework and practice in many jurisdictions have prescribed steps which may be taken where one party tries to frustrate the process by failing to participate.<sup>96</sup> In other words, going by the aforementioned decision of the court in *Cott v Barber*,<sup>97</sup> the courts will not only enforce an arbitration agreement, the law has also put into place systems to circumvent any attempt made by any of the parties to frustrate the arbitration process. For example, *Section 17 of the English Act* provides that “where each of two parties to an arbitration

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<sup>91</sup> (1997) 3 All ER 540.

<sup>92</sup> See also the following Nigerian cases; *K.S.U.D.B. V. Fanz Construction. Co Ltd* (1990) 6 SC 103; *Royal Exchange Assurance V. Bentworth Finance (Nig.) Ltd.* (1976) 11 SC 107.

<sup>93</sup> Carita Wallgren-Lindholm (n 69) 12.

<sup>94</sup> Jean-Francois Guillemain (n 32) 21.

<sup>95</sup> Paul Newman (n 49) 12.

<sup>96</sup> For example, see Section 5 of the Nigerian Arbitration and Conciliation Act as well as Section 9 of the English Arbitration Act, which mandate the court to stay proceedings when a party initiates proceedings in breach of an arbitration agreement. In addition, see the Nigerian case of *The Owners of the M.V. Lupex V. Nig. Overseas Chartering & Shipping Ltd* (2003) 10 SCM 71.

<sup>97</sup> (1997) 3 All ER 540.

agreement is to appoint an arbitrator and one party (“the party in default”) refuses to do so, or fails to do so within the time specified, the other party, having duly appointed his arbitrator, may give notice in writing to the party in default that he proposes to appoint his arbitrator to act as sole arbitrator”.<sup>98</sup> Similarly as mentioned previously, in many jurisdictions, any attempt by any of the parties to initiate litigation proceeding in breach of a valid arbitration agreement, will be liable to an order of stay of proceedings by the court.<sup>99</sup>

While parties’ input and cooperation remain pertinent in the conduct of all the other ADR proceedings, arbitration strikes a balance between the parties’ input and cooperation needed during ADR processes, and the need for a defined and binding process, which is usually found in litigation proceedings. In an arbitration proceeding, one can arguably assert that unless parties are able to reach an agreement, they have little or no say in procedural decisions. Unlike his counterparts in a negotiation, mediation or conciliation proceedings, who are seemingly limited, an arbitrator’s role is pronounced, defined and definitely more authoritative.<sup>100</sup> In *Carlisle Place Investments Ltd v Wimpey Construction (UK) Ltd*, the English Court opined that there was no requirement that an arbitrator must allow each party to call all the evidence which he wishes to call. It must depend on the circumstances of the particular case and whether or not the arbitrator decides in the exercise of his discretion, to conduct the arbitration in a particular way.<sup>101</sup> An arbitrator is able to make procedural decisions when parties have not been able to come to an agreement. He is also able to request for an expert’s opinion before making a decision; for

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<sup>98</sup> English Arbitration Act 1996.

<sup>99</sup> See for example Section 5 of the Nigerian Arbitration and Conciliation Act and Section 9 of the English Arbitration Act 1996. This has been referred to as a method or policy of indirect enforcement. In other words, it is an indirect method of preventing a party to a valid arbitration agreement from avoiding his obligation to arbitrate. See Nigel Blackaby et al (n 5) 17.

<sup>100</sup> Different Acts give arbitrators varying degrees of discretion to administer the arbitration. For example, Article 16(1) of the UNCITRAL Model Law; Section 12 of the Nigerian Arbitration and Conciliation Act 2004; Article 11 of the Uniform Act on Arbitration and the Section 30(1) of the English Arbitration Act 1996 allows the arbitrators entertain and deal with any application relating to its jurisdiction.

<sup>101</sup> (1980) 15 BLR 109, 117.

example, the English Act allows the arbitration tribunal to appoint experts, legal advisers and/or assessors to advice on issues of a technical nature.<sup>102</sup>

Similarly important is the fact that in arbitration, the success and conclusion of the process does not depend on parties' agreement and/or compromise.<sup>103</sup> *Section 58 of the English Arbitration Act* clearly states that "...an award made by the tribunal pursuant to an arbitration agreement is final and binding both on the parties and on persons claiming through or under them".<sup>104</sup> This final decision can even be based on the case of one party but only after proof of such a case and after reasonable opportunity has been given to the other party to defend same.<sup>105</sup> This was the decision of the Nigerian Supreme Court in *N.O. Motanya & Ors V. Elijah Elinwa & Ors*, where it held that an arbitrator may proceed with a reference in the absence of one of the parties, if he choose not to attend. The party ought to have notice that the arbitrator will proceed ex parte in the case if he does not attend.<sup>106</sup> On the other hand, the end result of an ADR proceeding can at best be regarded as a contractual term, which parties can technically still resile from, but of course, with consequences. In other words, the result of any of the other ADR proceedings can only be as an outcome of the cooperation of both parties.

Finally, the decision of the arbitral tribunal is not only binding, it is also enforceable on both parties, subject to certain judicial procedures.<sup>107</sup> The Nigerian Supreme Court has held that once an award has been made and not challenged in court, it would be entered as a judgment and given effect accordingly.<sup>108</sup> This is unlike the end products of a negotiation, mediation and conciliation, which like many contractual terms, parties can technically, still, resile from and so there is no guaranteed finality.<sup>109</sup> Nadja Alexander admits that the major limitation of mediation is its lack of finality as well

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<sup>102</sup> English Arbitration Act 1996, section 37.

<sup>103</sup> Nigel Blackaby et al (n 5) 29.

<sup>104</sup> See also Section 31 of the Nigerian Arbitration and Conciliation Act among other examples.

<sup>105</sup> The Nigerian Supreme Court has held in *Raz Pal Gazi v. FCDA* (2001) 7 SCM 195 that once an issue has been raised and decided upon by the panel, the parties will not be allowed to thereafter re-open it since parties will not be allowed to do so in the case of a judgement of the court.

<sup>106</sup> (1994) 7-8 SCNJ 615.

<sup>107</sup> See for example Section 31(3) of the Nigerian Arbitration and Conciliation Act 2004.

<sup>108</sup> *Ras Pal Gazi V. FCDA* (2001) 7 SCM 195.

<sup>109</sup> Of course in such situations, the party who has breached the agreement may be liable to pay damages.



as its uncertainty in relation to enforceability.<sup>110</sup> In other words, unlike arbitration, where a person will be held bound by the award, under any of the other ADRs, a party is able to avoid any agreement reached by paying damages for the effect of his breach.<sup>111</sup> This is one of the underlying factors behind the rise of the Med-Arb practice: the ability to convert a mediation agreement to an award.<sup>112</sup> Therefore, it is little wonder that under the other types of ADR, upon reaching a compromise, parties still approach the court for a consent judgement or a judgement on the terms of an agreement, in order to protect themselves from the implications of a sudden breach.<sup>113</sup> The Nigerian Supreme Court has held in *Star Paper Mill Ltd & Anor v Bashiru Adetunji & Ors* that “when terms of settlement or...compromise agreement become an order of court on the application of the parties, it in legal parlance becomes a consent judgement.”<sup>114</sup> The Nigerian Supreme Court went on in another decision<sup>115</sup> to state that “it is inconceivable that one of the parties to a compromise judgement should be at liberty to contend in subsequent proceedings between the same parties that he is not bound by the order to which he had previously consented.”<sup>116</sup> This practice has also been incorporated into arbitration practice.

#### 4.0 ABANDONING THE CONCEPT KNOWN AS ALTERNATIVE DISPUTE RESOLUTION

In a previous part of this chapter, we highlighted the fact that there is a debate as to whether arbitration is indeed an ADR. Proponents of this theory opine that it is every

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<sup>110</sup> Nadja Alexander, *International and Comparative Mediation* (Kluwer Law International 2009) 1.

<sup>111</sup> Admittedly the EU Directive 2008/52/EC addresses this problem in Article 6 as it provides that the final agreement of a mediation shall be enforceable unless the agreement is contrary to the law of the member State where it is sought to be enforced or the law of the said member State does not provide for the enforceability of such agreements. At the moment, there is no such framework at an international level. The court may however issue an order of specific performance in certain situations, especially when the court is of the opinion that no amount of money may be able to compensate for the effects of the breach.

<sup>112</sup> Renate Dendorfer and Jeremy Lack, ‘The Interaction Between Arbitration and Mediation: Vision v Reality’ (2007) 1 *Dispute Resolution International* 73, 85.

<sup>113</sup> Simon Roberts, ‘Settlement as Civil Justice’ (2000) 63(5) *The Modern Law Review* 739; Arthur W. Ravine, ‘International Arbitration and Alternative Methods of Dispute Resolution’ (1996) 90 (Proceedings of the Annual Meeting American Society of International Law) 75.

<sup>114</sup> (2009) 6-7 SC (Pt III) 68.

<sup>115</sup> *J.S Talabi v Madam Abiola Adeseye* (1972) 8-9 SC 15.

<sup>116</sup> *Vulcan Gases Ltd v. Gesellschaft Fur Inds Gasverwertung A.G* (2001) 8 SCM 143.

bit as contentious as litigation and unlike the other ADR mechanisms, an arbitration like litigation, results in a binding and enforceable decision.<sup>117</sup> We have however adopted the more pragmatic approach to this debate by accepting the approach which views ADR as any method of resolving disputes apart from litigation.<sup>118</sup> This idea implies that there is a principal and/or traditional method of resolving dispute, that is litigation and that any other method is an alternative to the traditional method.

However, recent developments, especially in the area of international commercial law, clearly suggest that litigation is no longer the principal method of dispute resolution.<sup>119</sup> According to Redfern and Hunter on International Arbitration, “international arbitration has become the principal method of resolving disputes between States, individuals and corporations in almost every aspect of international trade, commerce and investment”.<sup>120</sup> This is because, as we will see later on in this chapter, litigation has proven to be an unsuitable method of resolving international commercial disputes. It is safe at this point to submit that arbitration and not litigation is the principal method of resolving international commercial disputes.

If we therefore adopt the earlier argument that ADR refers to all other methods of resolving disputes apart from the principal method of resolving disputes, which for a long time happened to be litigation, since arbitration has become the principal method of resolving international commercial disputes, we must also be open to the argument that every other method that can be used to resolve international commercial disputes (including litigation) is indeed an alternative dispute resolution method to arbitration. The problem is that this leads to confusion as to the real definition and scope of ADR, since depending on the angle from which it is being viewed, ADR could in one breath refer to arbitration, mediation, negotiation and conciliation and in another refer to litigation, mediation, negotiation and conciliation. It would seem as if the definition

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<sup>117</sup> Dixon, ‘Alternative Dispute Resolution Developments in London’ (1990) 4 International Construction Law Review 436, 437; Nigel Blackaby et al (n 5) 40.

<sup>118</sup> Susan Blake et al (n 37) 5; Uchenna Jerome Orji, ‘Law and Practice of Conciliation in Nigeria’ (2012) 56(1) Journal of African Law 87, 88.

<sup>119</sup> Robert Mnookin (n 70) 9.

<sup>120</sup> Nigel Blackaby et al, Redfern and Hunter on International Arbitration, (5<sup>th</sup> Edition, Oxford Press, 2009) 1.

of ADR depends to a large extent on the nature of the dispute in question. An alternative argument is that litigation is the default method, that is the option that applies unless otherwise agreed. It is therefore a wrong and very outdated practice to refer to only a specific set of dispute resolution mechanisms as ADRs when in actual fact and in one way or the other, all the methods of dispute resolution are indeed alternatives to each other.

Even if we assume that the concept popularly referred to as ADR has a definable scope and that it refers to arbitration, mediation, negotiation and conciliation, it is submitted that the title ADR is very misleading because it obviously does not reflect the current reality of civil procedure. The word alternative implies an “either / or” interpretation,<sup>121</sup> but modern legislations in many jurisdictions clearly show that litigation as a method of dispute resolution is no longer an exclusive process.<sup>122</sup> In practice, many rules of civil procedure have incorporated these so-called “alternative” processes as part of the litigation process, where they serve more of a complementary role rather than an alternative one.<sup>123</sup> This practice especially when contained in an agreement is known as a multi-step or escalation clause.<sup>124</sup>

Lord Bingham of Cornhill rightly opines that “conventional litigation processes and ADR are not enemies, but partners. Neither can ignore developments in the other”.<sup>125</sup> As Fiadjoe notes, “at present, it is perhaps more accurate to include in these processes, some aspects of litigation, such as case management. In any case, primarily in the USA, ADR has developed as an adjunct to the legal systems, rather than in direct contrast to litigation”.<sup>126</sup> Furthermore, Richard Hill submits that “while mediation can at times

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<sup>121</sup> Simon Roberts, ‘Towards a minimum form of Alternative Intervention’ (1986) 11 *Mediation Quarterly* 25.

<sup>122</sup> Robert Mnookin (n 69); See Steven Shavell, ‘Alternative Dispute Resolution: The Economic Analysis’ (1995) 24 *Journal of Legal Studies* 1; Richard C. Reuben, ‘Towards a State Action Theory of Alternative Dispute Resolution’ (1997) 85(3) *California Law Review* 577, 594.

<sup>123</sup> Steven Shavell has rightly pointed out that the ADR in litigation adds another layer to the mechanism, which may not be worth it. One must however add that whether or not it will be worth it will depend on the number of disputes that are determined at pre-trial stage. Resolving a dispute at pre-trial stage will not only save a lot of money but also the time of parties. See Steven Shavell, ‘Alternative Dispute Resolution: The Economic Analysis’ (1995) 24 *Journal of Legal Studies*, 1; Simon Robert, ‘Settlement as Civil Justice’ (2000) 63(5) *The Modern Law Review* 739.

<sup>124</sup> Renate Dendorfer and Jeremy Lack (n 112) 75.

<sup>125</sup> K.J Mackie, *The ADR Practice Guide; Commercial Dispute Resolution* (Butterworths Publishing 2000)

<sup>126</sup> Albert Fiadjoe (n 26) 19.

help to resolve disputes before they are litigated, it is often used to resolve them during the course of litigation, before the final award is rendered. Indeed mediation can also be used at the early stages of arbitration..."<sup>127</sup> For example, the *High Court of Lagos State (Civil Procedure) Rules 2012* mandates parties to participate in "ADR" proceedings, subsequent upon which they may then be allowed to initiate proper court proceedings.<sup>128</sup> *Article 197 of the Swiss Civil Procedure Code* clearly provides that "litigation shall be preceded by an attempt at conciliation".<sup>129</sup> However parties are allowed to opt for mediation (instead of conciliation) under appropriate circumstances.<sup>130</sup> In fact, the English courts in *Dunnet v Railtrack*<sup>131</sup> penalised a party for failing to heed the court's advice to consider ADR.<sup>132</sup> It is therefore clear that litigation has evolved from a stand-alone process to a more inclusive process.<sup>133</sup>

Even in arbitration proceedings, the foremost dispute resolution institutions encourage parties to explore mediation proceedings, after which they may then institute arbitral proceedings. In its recently released Mediation Rules, the ICC recommends a mediation clause, which provides that "in the event of any dispute arising out of or in connection with the present contract, the parties shall first refer the dispute to proceedings under the ICC Mediation Rules. If the dispute has not been settled pursuant to the said Rules within forty-five days following the filing of a Request for Mediation or within such other period as the parties may agree in writing, such dispute shall thereafter be finally settled under the Rules of Arbitration of the International Chamber of Commerce by one or more arbitrators appointed in accordance with the said Rules of Arbitration."<sup>134</sup> We therefore see the ICC allowing parties explore the non-contentious mediation process before opting for the

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<sup>127</sup> Richard Hill, 'Non-Adversarial Mediation' (1995) 12 (4) *Journal of International Arbitration* 135, 136.

<sup>128</sup> *High Court of Lagos State Civil Procedure Rules 2012*; order 3(11) and order 25.

<sup>129</sup> *Swiss Civil Procedure Code* of 19 December 2008 <[www.admin.ch/opc/en/classified-compilation/20061121/index.html](http://www.admin.ch/opc/en/classified-compilation/20061121/index.html)> accessed 28 October 2014.

<sup>130</sup> *Swiss Civil Procedure Code*, article 213.

<sup>131</sup> (2002) 1 WLR 2434.

<sup>132</sup> See also Section 278 of the *Code of Civil Procedure* of 5<sup>th</sup> December 2005 <[www.gesetze-im-internet.de/englisch\\_zpo/englisch\\_zpo.html](http://www.gesetze-im-internet.de/englisch_zpo/englisch_zpo.html)> accessed 28 October 2014.

<sup>133</sup> Joshua D. Rosenberg and H. Jay Folberg, 'Alternative Dispute Resolution: An Empirical Analysis' (1994) 46(6) *Stanford Law Review* 1487, 1487-1489.

<sup>134</sup> ICC, 'Arbitration and ADR' <[www.iccwbo.org/products-and-services/arbitration-and-adr/mediation/rules/](http://www.iccwbo.org/products-and-services/arbitration-and-adr/mediation/rules/)> accessed 28 October 2014.

contentious arbitration process. In a situation where parties have agreed to explore ADR mechanisms before arbitration, they must exhaust the former before a subsequent arbitration proceeding can be validly initiated by any of the parties.<sup>135</sup>

Likewise, it is virtually impossible to rule out the litigation process from arbitration proceedings. At various times and depending on the statutory framework in question, we see the involvement of the court in the arbitration process. For example, an award creditor is allowed to initiate enforcement proceedings in the court in order to enforce an award against an unwilling party in a foreign jurisdiction.<sup>136</sup> We therefore see litigation by virtue of the authority of the New York Convention “stepping up” to make up for this “shortcoming” of arbitration.

The question then is, if indeed the various procedural laws of the court make it mandatory for parties to explore these so called ADR procedures and if the different alternative dispute resolution rules of the foremost dispute resolution institutions also encourage parties to participate in other dispute resolution systems by way of a complementary process, is the definition of ADR still relevant or valid?

Admittedly, this concept may have been relevant at a time when litigation was the traditional and principal method of resolving all disputes. At that time, it made sense to refer to all other methods of resolving disputes as being alternatives to litigation. However, in an era where the principal method of resolving a dispute depends on the nature and type of dispute in question, restricting the scope of ADR to a particular set of dispute resolution methods amounts to unreasonable dogma. It completely counters all the efforts made by stakeholders to promote arbitration, mediation, negotiation and conciliation when we still tag these methods with a name that arguably implies that they are second-rate to litigation despite recent trends suggesting otherwise. The fact that this has always been the practice is no reason to be bound by the shackles of the past. If we insist on sticking with this very outdated acronym known as ADR, the word “alternative” within the concept is very

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<sup>135</sup> Ilias Bantekas (n 3) 11.

<sup>136</sup> The New York Convention 1958; article III and IV.

misleading. As discussed above, the modern rules of many dispute resolution systems clearly show that these systems are not mutually exclusive.

In concluding this part of the chapter, a number of questions arise, which we will deal with in the concluding chapters of this thesis. We have seen that many jurisdictions have made ADR mechanisms a kind of pre-action step to litigation proceedings.<sup>137</sup> It is however not clear if ADR in this context includes arbitration. In view of *Article 7 of the African Charter on Human and Peoples Right* and *Article 6 of the European Convention on Human Rights*, for example, which seem to guarantee parties right of access to the public courts, can the law force parties to arbitrate their disputes? How do we reconcile the provisions of the aforementioned international instruments, which seem to guarantee parties right of access to the courts, with decisions of the English court as in the case of *Halsey v Milton Keynes General NHS Trust*,<sup>138</sup> where the Court of Appeal held that the courts are able to strongly encourage parties to explore mediation? How do we also reconcile the aforementioned decision with decisions of the English courts, where a party was penalised for not exploring ADR?<sup>139</sup>

Very similar is a recent development in a jurisdiction like Ghana, where the courts have been empowered to refer any pending litigation, which in its opinion is more suited for arbitration, to arbitration.<sup>140</sup> A number of questions arise as regards the validity of such an arbitration since the existence of an agreement in such a situation is questionable.<sup>141</sup> Can a decision of an arbitration tribunal be challenged on this basis? We address these questions in Chapter Six of this thesis.

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<sup>137</sup> We discuss this in Section 4.0 of this chapter.

<sup>138</sup> (2004) 1 WLR 3002, para 32.

<sup>139</sup> See South African case of *Brownlee v Brownlee* 2008/25274, English case of *Nigel Witham Ltd v Smith* (2008) EWHC 12 (TCC) amongst others.

<sup>140</sup> We discuss this in Section 1.1.2 of Chapter Six.

<sup>141</sup> The existence of a valid arbitration agreement is questionable because of the strong influence the order of the court will have on parties' decision to arbitrate. We discuss this Section 1.1.2 of Chapter Six.

## 5.0 ARBITRATION: A VIABLE ALTERNATIVE TO LITIGATION

### 5.1 Limitations of litigation

In Chapter Two, we extensively discussed some of the problems of the Nigerian Court system. We highlighted delay and backlog of cases, industrial strikes, incompetent Judges and bad decisions as some of these problems. In order to tackle them, we concluded the said chapter by making a case for reforms especially emphasizing the viability of arbitration as a solution and as an alternative method to litigation.

In addition to the aforementioned points, other factors have emerged, which have further emphasised the inadequacies of litigation. Unlike the situation in the past where business activities were limited to the confines of a particular jurisdiction, business relationships have now developed beyond State boundaries. Today the world has become one big economic village. Christian Buhring-Uhle submits that “the world is becoming smaller as national boundaries are becoming more permeable and are gradually losing their economic significance. The volume of world trade is steadily increasing modern technology and the continuing shift towards market economies and free trade are creating an increasingly globalised world economy”.<sup>142</sup> There has been an increase in the number of cross-border transactions and relationships existing between parties from different jurisdictions. Parties are more adventurous and willing to partner with foreign persons, both natural and artificial.

Unfortunately, this development has also created a multitude of legal problems which have had to be reverted to the courts, thus emphasizing some of the inadequacies of the court system highlighted in the previous chapter. Neither party may be willing to submit to the jurisdiction of a counterpart for fear that it will confer some form of advantage on the other party. Furthermore, parties have found themselves having to deal with unexpected Conflict of Laws and Renvoi issues arising as a result of the many and very different laws involved in a typical international commercial contract. Dicey, Morris and Collin illustrate this issue when they submit that, “if an action is brought in an English Court for damages for breach of a contract made in England

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<sup>142</sup> Christian Buhring- Uhle, *Arbitration and Mediation in International Business* (2<sup>nd</sup> Edition), International Arbitration Law Library, Volume 13 (Kluwer Law International 2006) 5.

between two Englishmen and to be performed in England, there is no foreign element, the case is not a case in the conflict of laws, and the English court will naturally apply English internal or domestic law. But if the contract had been made in Switzerland between two Swiss and was to be performed in Switzerland, then the case would (for an English, but not for a Swiss court) be a case in the conflict of law, and the English court would apply Swiss law to most of the matters in dispute before it, just as a Swiss court would naturally apply Swiss law to all such matters. If we change the facts once more and assume that the contract was made in Switzerland between an Englishman and a Swiss but was to be performed in England, the case is a case in the conflict of laws not only for an English court but also for a Swiss court and indeed for any court in the world in which the contract is litigated..."<sup>143</sup> Parties are foisted with implications that they may not have foreseen and the courts are also expected to decide a dispute through a system of laws with which they may not be familiar or conversant with.

Even when parties are able to agree on a particular national court, the problem of enforcing the judgement in a foreign jurisdiction becomes pertinent since under international law, the process of enforcing a foreign judgement in another jurisdiction is not straightforward. Christian Buhring- Uhle rightly notes that "due to territorial limitations of jurisdiction, a court judgement has no force outside the jurisdiction where it is rendered".<sup>144</sup> In other words, the judgement is subject to the laws of the forum court. This difficulty can be attributed to the principle of sovereignty, which recognises the independence of every state from external control. In Nigeria, for example, the enforcement of foreign judgements is governed by the Foreign Judgements (Reciprocal Enforcement) Act.<sup>145</sup> Apart from judgements from England, Ireland, Scotland and every other country that make up the Commonwealth,<sup>146</sup> the enforcement of judgements from other jurisdictions is subject to certain requirements. A party who has successfully obtained judgement in country P could very well face a

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<sup>143</sup> Collins et al, *Dicey, Morris and Collins on Conflict of Laws*, (15<sup>th</sup> Edition, Sweet and Maxwell 2014) 1.002.

<sup>144</sup> Christian Buhring- Uhle (n 142) 25.

<sup>145</sup> Chapter F35, Laws of Federation of Nigeria 2004; See also *Grosvenor Casinos Ltd v Ghassan Halaoui* (2009) LPELR-SC 373.

<sup>146</sup> There are however steps to be followed.



situation where country B refuses to recognize and enforce his judgement for failing to fulfil certain internal requirements.

Many jurisdictions have therefore entered into some form of agreement or relationship with other jurisdictions in order to bridge this gap. Unfortunately, many of the existing conventions and regulations are limited along continental lines. There is no encompassing regulation or convention in international litigation that cuts across all jurisdictions. In England for example, the recognition and enforcement of foreign judgement is regulated by the *Brussels Regulation*,<sup>147</sup> the *European Enforcement Order ("EEO") Regulation*<sup>148</sup> and the *Lugano Convention*,<sup>149</sup> among other existing but specific bilateral agreements. The *Brussels Regulation* and the *EEO Regulations* are limited to members of the European Union.

More recently, commercial relations generally have now assumed a very technical and specialised nature, which many national courts, as we mentioned in Chapter Two, have proven incapable of properly administering. These emerging and very technical areas of commercial law often require special knowledge and experience to administer.<sup>150</sup> As Gary Born rightly noted, "in some states, local courts have little expertise or training in resolving international transaction or disputes and can face serious difficulties in fully comprehending the business context and terms of the parties dispute".<sup>151</sup> Julian D.M Lew, Loukas A. Mistelis et al in their own contribution to this issue opined that the courts in many jurisdictions "do not necessarily have the knowledge of, or ability to handle disputes arising from international business transactions or even disputes between parties from different countries i.e with conflicting legal cultural, political and ethical systems."<sup>152</sup> Judges therefore find themselves having to grapple with issues beyond their knowledge and/or

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<sup>147</sup> (EC) No 44/2001.

<sup>148</sup> (EC) No 805/2004.

<sup>149</sup> 21 December 2007 (L339/3).

<sup>150</sup> In Section 4.0 of Chapter Two of this thesis, we emphasise the need for continued training for judicial officers.

<sup>151</sup> Gary Born, *International Arbitration and Practice* (Kluwer Law International 2014) 80.

<sup>152</sup> Julian D.M Lew, Loukas A. Mistelis, et al (n 38) 5.

comprehension, leaving parties to deal with the effects of their confusion, which can often be disastrous.<sup>153</sup>

Parties may also find themselves very reluctant (and reasonably so) to submit their dispute to the courts of particular jurisdictions, even when it is clear and obvious that these courts are properly seised of the dispute. This can be due to a number of reasons. For example, the courts in some jurisdictions have been known to be corrupt, slow and overworked,<sup>154</sup> thereby making them unsuitable for modern business disputes, which are frequently time-sensitive. Another key reason is the need to put an end to the dispute resolution process. For example, the two (2) staged appeal process within the Nigerian civil litigation system has proven to be a useful tactic to frustrate, delay or wear out a judgement creditor.<sup>155</sup>

Also, the nature of many international contracts seem to require that business affairs are kept discreet and private. Jean-Francois Guillemin submits that “wrong or incomplete publicity about a dispute can harm a company, commercial activity, share price or ability to raise finance”.<sup>156</sup> This explains the rise in the use of Non-Disclosure Agreements.<sup>157</sup> It therefore completely defeats the whole purpose and effort behind a Non-Disclosure Agreement when parties are required to bare all, through a dispute resolution system that is open to the public.

All these reasons among many others, have encouraged the rise of arbitration especially in the resolution of international commercial disputes.

## **5.2 How does Arbitration come in?**

The structure and practice of arbitration has, in more recent years, evolved from what Professor Philippe Fouchard previously referred to as an “an apparently rudimentary

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<sup>153</sup> Judges usually have generalist knowledge and not specialist knowledge of law except when it is a special court like the National Industrial Court. See Robert Mnookin (n 70) 4.

<sup>154</sup> In Chapter Two of this thesis for example, we discussed the heavy workload of the Nigerian courts.

<sup>155</sup> We discussed the problems of delay and backlogs of case in Section 5.1 of Chapter Two.

<sup>156</sup> Jean-Francois Guillemin (n 32 ) 38.

<sup>157</sup>UK Intellectual Property-Guidance for Non-Disclosure Agreements’ Gov.UK <[www.gov.uk/government/publications/intellectual-property-non-disclosure-agreements](http://www.gov.uk/government/publications/intellectual-property-non-disclosure-agreements)> accessed 10 October 2014.

method of settling disputes”<sup>158</sup> to a more developed and seemingly complicated process. Gone are the days when parties submitted their disputes to “ordinary individuals whose only qualification is that of being chosen by the parties.”<sup>159</sup> Today, arbitration has assumed a more developed and defined position. According to Redfern and Hunter, “States have modernized their laws so as to be seen to be arbitration friendly, firms of lawyers and accountants have established dedicated groups of arbitration specialists; conferences and seminars proliferate and the distinctive law and practice of international arbitration has become a subject for study in universities and law schools alike”.<sup>160</sup> Unfortunately, countries like Nigeria are yet to update their framework to reflect modern trends and practices.<sup>161</sup>

The practice of modern arbitration has its roots in the doctrine of party autonomy,<sup>162</sup> which refers to the “freedom of the parties to construct their contractual relationship in the way they see fit”<sup>163</sup> and independent of the constraints of national law.<sup>164</sup> It is the “guiding principle in determining the procedure to be followed in an international commercial arbitration. It is a principle that has been endorsed not only in national laws, but by international arbitral institutions and organizations.”<sup>165</sup> Not only does this doctrine provide the foundation for arbitration, it provides the legal basis for the decisions taken by the parties throughout the proceedings.<sup>166</sup> Gaillard and Savage add that “the obligation to submit disputes covered by an arbitration agreement to arbitration, results from a straightforward application of the principle that parties are

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<sup>158</sup> P Fouchard, *L' Arbitrage Commercial International* (Litec 1965) 1.30, 31.

<sup>159</sup> *ibid.*

<sup>160</sup> Nigel Blackaby et al, *Redfern and Hunter on International Arbitration*, (5<sup>th</sup> Edition, Oxford Press, 2009) pg 1.

<sup>161</sup> We build up on this in Chapter Four and Six of this thesis.

<sup>162</sup> Loukas A. Mistelis, ‘Arbitrability- International and Comparative Perspectives: Arbitrability a National or an International Law Issue?’ in Loukas A Mistelis and Stavros L. Brekoulakis (eds), *Arbitrability: International and Comparative Perspectives* (Kluwer Law International 2009) 4.

<sup>163</sup> S Abdulhay, ‘Corruption in International trade and Commercial Arbitration’ (Kluwer Law International 2004) 159.

<sup>164</sup> See Fouchard (n 160 ); Gaillard, *Legal Theory of International Arbitration* (Martinus Nijhoff 2010)

<sup>165</sup> Redfern and Hunter with Blackaby and Partasides, *Laws and Practice of International Commercial Arbitration* (4<sup>th</sup> Edition, 2004) 315.

<sup>166</sup> Emmanuel Gaillard and John Savage (eds), *Fouchard Gaillard Goldman on International Commercial Arbitration* (Kluwer Law International 1999) 1; See also Julian D.M Lew QC, ‘Introduction: Fundamental Problems in International Arbitration’ in Julian D.M Lew and Loukas A. Mistelis, *Pervasive Problems in International Arbitration* (Kluwer Law International 2006) 5.

bound by their contracts. This principle, which is expressed as the maxim *pacta sunt servanda*, is probably the most widely recognized rule of international contract law".<sup>167</sup> This agreement is a conscious exercise of choice and it brings to life a creature (arbitration) that owes its existence to the will of parties alone.<sup>168</sup>

Section 1(b) of the English Act provides that "parties shall be free to agree on how their disputes are resolved, subject only to such safeguards as are necessary in the public interest".<sup>169</sup> The Model law also states that "...parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting their proceedings."<sup>170</sup> It is this very principle of party autonomy that gives parties the right to opt out of their legal right of access to the court and choose arbitration.<sup>171</sup> Julian D.M Lew et al rightly noted that "however fulsome or simple the arbitration agreement, the parties have ultimate control of their dispute resolution system".<sup>172</sup> In other words, by exercising this right of autonomy, parties and their counsel are able to avoid some of the bottlenecks that may be encountered in litigation. It enables parties avoid the endemic jurisdictional choice of law difficulties that may accompany international contracts, for example <sup>173</sup>.

Of course, one must point out that the seemingly unlimited right of parties to opt for arbitration and determine their arbitration process, is not open ended as it is subject to the principle of arbitrability. As Professor Bantekas rightly noted, questions on arbitrability are usually determined by reference to the relevant domestic law of the forum.<sup>174</sup> For example, issues relating to environmental law are not arbitrable in

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<sup>167</sup> *ibid* 382.

<sup>168</sup> *Dell Computer Corp V Union des consommateurs* 2007 SCC 34, (2007) 484 D.L.R. (4<sup>th</sup>) 577, [51].

<sup>169</sup> The English Arbitration Act 1996.

<sup>170</sup> UNCITRAL Model Law, art 19(1).

<sup>171</sup> Piero Bernardini, 'The Arbitration Clause of an International Contract' 1988 9(2) *Journal of International Arbitration* 45, 46.

<sup>172</sup> Julian D.M Lew, Loukas A. Mistelis, et al (n 38) 4.

<sup>173</sup> Gary Born (n 151) 76.

<sup>174</sup> Ilias Bantekas, 'The Foundations of Arbitrability in International Commercial Arbitration' (2008) 27 *Australian Year Book of Internal Law* 193. We highlight and discuss specific jurisdictional limits in Chapter Six of this thesis. However, for a wider, detailed and comparative discussion on this issue, see Ilias Bantekas, 'The Foundations of Arbitrability in International Commercial Arbitration' (2008) 27 *Australian Year Book of Internal Law* 193; Loukas A Mistelis and Stavros L. Brekoulakis (eds), *Arbitrability: International and Comparative Perspectives* (Kluwer Law International, 2009) 1; H. Arfazadeh, 'Arbitrability under the New York Convention: The Lex Fori Revisited' (2001) 17 *Arbitration International* 73; B. Henotiau, 'What law governs the issue of arbitrability?' (1996) 12 (4) *Arbitration*

Ghana.<sup>175</sup> In addition, a jurisdiction like the United Kingdom has compulsory or what is known as mandatory provisions, which take precedence over parties' agreement.<sup>176</sup>

According to Redfern and Hunter, "a reference to arbitration means that the dispute is likely to be determined in a neutral forum (or place of arbitration) rather than on the home ground of one party or the other."<sup>177</sup> The Nigerian Supreme Court in *Commerce Assurance Limited v Alli* held that "...to constitute a proper arbitration, which the courts can enforce, there must be an agreement to submit the matter to arbitration."<sup>178</sup> As Gary Born rightly noted, "absent a valid agreement to arbitrate, there are generally no legal grounds for requiring a party to arbitrate a dispute or for enforcing an arbitral award against a party".<sup>179</sup> Rosabel E. Goodman-Everard recommends that the agreement be as broad as possible in order to avoid unnecessary controversy as to the validity of the agreement as well as the jurisdiction of the arbitrators.<sup>180</sup> A standard arbitration agreement should determine the following; the applicable law, the seat of arbitration, the number of arbitrators, the language of the arbitration and the form of arbitration.

Subject to the applicable law, a valid arbitration agreement can either be oral or in writing.<sup>181</sup> The revised UNCITRAL Model Law for example provides for both oral and written arbitration agreements.<sup>182</sup> Piero Bernardini opined that "because of the importance of an agreement, which is meant to exclude the jurisdiction of the national

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International 391; J. Paulsson, 'Arbitrability still through a Glass Darkly' in *Arbitration in the Next Decade* (ICC Bulletin, Special Supplement, 1999) 95.

<sup>175</sup> Ghanaian Alternative Dispute Resolution Act 2010, section 1.

<sup>176</sup> See for example, Schedule 1 of the English Arbitration Act 1996.

<sup>177</sup> Nigel Blackaby et al, *Redfern and Hunter on International Arbitration*, (5<sup>th</sup> Edition, Oxford Press, 2009) 32.

<sup>178</sup> (1992) 4 SCNJ 145.

<sup>179</sup> Gary Born (n 151) 1.

<sup>180</sup> Rosabel E. Goodman-Everard, 'Choosing a Place for International Arbitration: The New York Option' (1985) 2(2) *Journal of International Arbitration* 39, 47.

<sup>181</sup> An arbitration agreement can be made either before the dispute arises (an arbitration clause in the contract) or after the dispute arises (submission agreements). Redfern and Hunter on International Arbitration have pointed out that these two types of agreements have been joined by a third one known as an agreement to arbitrate which is deemed to arise under international instruments such as a Bilateral Investment Treaty (BIT) entered into by one state with another. See Nigel Blackaby et al (n 5) 13.

<sup>182</sup> For example, UNCITRAL Model Law on International Arbitration 2006, article 7.

courts, the arbitration agreement must be writing".<sup>183</sup> The aforementioned is a blanket statement, which is subject to considerations. For example, we argue in Chapter Four and Six of this thesis that developing countries like Nigeria, Ghana and the OHADA countries have no business incorporating and insisting on a strict written requirement for their domestic arbitration practice in view of the level of illiteracy in the said jurisdictions.

Admittedly, the aforementioned argument may not apply to international arbitration involving these jurisdictions. This is particularly important in cases where it is anticipated that the backing of a foreign court will be needed to enforce an arbitration award. *Article II of the New York Convention*,<sup>184</sup> which is the principal convention governing the enforcement of international arbitration awards, requires that the arbitration agreement be in writing. Writing has been defined to include "an electronic communication, if the information contained therein is accessible so as to be useable for subsequent reference".<sup>185</sup> This flexible definition given to the concept of writing emphasizes the fluid nature of arbitration.<sup>186</sup> Parties in different jurisdictions are therefore able to enter into a valid international arbitration agreement conveniently.

Going back to Chapter Two, parties are able to avoid the problems of delay, lengthy and periodic industrial strike actions and backlog of cases by appointing arbitrators with the time and flexibility needed to properly resolve their disputes. As we will see in Chapter Six, many jurisdictions stipulate that a prospective arbitrator provide parties with any information likely to affect his ability to effectively discharge his duties as arbitrator. In fact, the ICC's Arbitration Rules mandate the ICC court to consider the availability of the prospective arbitrator before appointment.<sup>187</sup>

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<sup>183</sup> Piero Bernardini, 'The Arbitration Clause of an International Contract (1988) 9(2) Journal of International Arbitration 45,48.

<sup>184</sup> Also known as the Convention on the Recognition and Enforcement of Foreign Arbitral Award 1958.

<sup>185</sup> UNCITRAL Model Law on International Arbitration 2006, article 7(4).

<sup>186</sup> This writer submits that apart from a clear and unequivocal agreement to arbitrate, a standard arbitration agreement should determine the following; the applicable law, the seat of arbitration, the number of arbitrators, the language of the arbitration and the form of arbitration.

<sup>187</sup> The ICC Arbitration Rules 2012, article 13(1).

In addition, modern arbitration provisions provide for pre-trial conferences in which parties are expected to meet and agree on preliminary issues which ordinarily would have stalled the proceedings.<sup>188</sup> Any agreement reached at this stage is to be recorded in the form of a Terms of Reference<sup>189</sup> and/or Procedural Time Table.<sup>190</sup> All of these measures help to minimize the possibility of delay to the barest minimum.

Parties can agree to have their arbitration administered either *ad hoc* or via the rules of an established arbitration institution. *Ad hoc* arbitration refers to proceedings governed by bespoke rules of procedure determined by either parties or their arbitrators. Piero Bernardini submits that “in an *ad hoc* arbitration...utmost care should be taken as to the drafting of the arbitration clause...”<sup>191</sup> Parties must, however, ensure that whatever rules they agree upon treat “...the parties with equality and allows each party a reasonable opportunity of presenting its case.”<sup>192</sup>

Institutional arbitration, on the other hand, refers to any dispute administered via the rules and services of an arbitration institution. This could either be via general institutions<sup>193</sup> or specialized institutions.<sup>194</sup> Unlike *ad hoc* arbitration, where parties get to determine the rules of procedure governing their dispute, parties who opt for institutional arbitration need not worry about such issues as they are usually already taken care of by the arbitration institution. Again, as previously mentioned, parties are able to choose and apply part or all of any law of their choice. The aforementioned point allows parties determine their disputes via rules and laws of their choice as against one foisted on them by the State.

Furthermore, parties to an international arbitration are able to take advantage of the sophisticated and up-to-date frameworks of institutions like the International

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<sup>188</sup> The ICC Arbitration Rules 2012, article 24.

<sup>189</sup> The ICC Arbitration Rules 2012, article 23.

<sup>190</sup> The ICC Arbitration Rules 2012, article 24.

<sup>191</sup> Piero Bernardini (n 183) 49.

<sup>192</sup> Nigel Blackaby et al, (n 120) 53.

<sup>193</sup> Generalist Institutions are set up to administer all types of commercial disputes. Examples include the International Chamber of Commerce, the London Court of International Arbitration, the International Centre for Dispute Resolution among many others.

<sup>194</sup> Specialist institutions are set up to administer special types of disputes. Examples include Court of Arbitration for Sport, Grain and Feed Trade Association Arbitration, London Maritime Arbitrators Association, among many others.

Chamber of Commerce and the London Court of International Arbitration. This provision allows parties avoid the problems and ambiguity associated with the flawed laws in a country like Nigeria as parties are in fact able to be specific and by extension avoid some of the negative effects of parts or all of a particular law.<sup>195</sup>

Parties to an arbitration proceeding have the option of appointing a specialized arbitration tribunal to administer their dispute.<sup>196</sup> This takes care of the issue of incompetence and corrupt staff members as highlighted in Chapter Two.<sup>197</sup> As Professor Andrew Chukwuemerie rightly noted, unlike a Judge, an arbitrator “owes the parties a direct responsibility or accountability as it were on how professionally and diligently he goes about his work. If he gets corrupt, he can be far more easily be challenged than a Judge can be challenged”.<sup>198</sup> Furthermore, as was submitted in Chapter Two, the average Judge in Nigeria lacks the exposure, knowledge and expertise needed to properly administer disputes arising from specialized transactions.

Arbitration therefore affords parties the opportunity to choose adjudicators with the requisite skill, training and knowledge needed to properly administer their specialized dispute.<sup>199</sup> For example, parties to a Nigerian land dispute may appoint an arbiter with the skills and knowledge of statutory and customary law<sup>200</sup> to administer their dispute. Parties could also approach any of the existing specialized institutions, appoint specialist arbitrators further to the rules of a general institution,<sup>201</sup>

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<sup>195</sup>Nigel Blackaby et al (n 5) 30.

<sup>196</sup> Janet A. Rosen, “Arbitration Under Private International Law: The Doctrine of Separability and Competence de la Competence” (1993-1994) 17 Fordham International Law Journal, 599, 600; Julian D.M Lew, Loukas A. Mistelis, et al (n 38) 8; Henry T. Edwards, ‘Alternative Dispute Resolution: Panacea or Anathema’ (1986) 99 (3) Harvard Law Review 668, 677; Andrew I. Okekeifere, “Commercial Arbitration as the Most Effective Dispute Resolution Method: Still a Fact or Now a Myth/” (1998) 15(4) Journal of International Arbitration, 81,91.

<sup>197</sup> Admittedly there have been allegations of corruption in arbitration but these are few and far between.

<sup>198</sup> Andrew Chukwuemerie (n 74) 11.

<sup>199</sup>There are now special trainings for prospective arbitrators and arbitration lawyers. This writer for example attended some of the special trainings and conferences organized by the ICC in September 2014.

<sup>200</sup> Customary law still constitutes an important part of the Nigerian land law. See Taslim Olawale Elias, *Nigerian land law* (Sweet and Maxwell 1971).

<sup>201</sup> For example, see London Maritime Arbitrators Association Term 2012, article 8.



request that a generalist institution appoints arbitrators with specific skills or even appoint a specialist arbitrator further to their ad hoc arbitration.<sup>202</sup>

Other considerations that may come into play when appointing an arbitrator include “prospective arbitrators’ nationality, residence and other relationships with the countries of which the parties or the other arbitrators are nationals and the prospective arbitrators’ availability...”<sup>203</sup> It has been opined that an arbitrator may be assumed to be neutral if he has a different nationality to that of the parties.<sup>204</sup> Generally, in a domestic arbitration, anybody including foreigners can be appointed as arbitrator.<sup>205</sup>

As an aside, it is the position of this writer that the well-established arbitration custom which allows parties to nominate their arbitrator (in a three-man tribunal), raises a number of ethical issues. For one, it is not unreasonable to assume that parties (or their counsel) will go “forum shopping” to select an arbitrator who holds a view that is sympathetic to their case. A good example of this can be seen in *Locabail v Bayfield Properties*,<sup>206</sup> which involved an insurance company. The court was forced to give leave to appeal when it was discovered that the arbitrator had expressed strong views in an academic article which went against the defendant and the insurers. Professor Martin Hunter acknowledged that in selecting an arbitrator, he is particular about selecting an arbitrator that is maximally predisposed to his client’s case as well as one that was likely to be persuaded by his clients’ argument.<sup>207</sup> The point being made here is that with reasonable diligence, a lawyer is able to circumvent the ends of “justice” by selecting an arbitrator who may be sympathetic to his case and not necessarily one that will be fair and just.

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<sup>202</sup> ICC’s International Court of Arbitration Rule 2012, article 12.

<sup>203</sup> International Chamber of Commerce (ICC) Arbitration Rules 2012, article 13.

<sup>204</sup> M. Scott Donahey, ‘The Independence and Neutrality of Arbitrators’ (1992) 9(4) Journal of International Arbitration 31, 32.

<sup>205</sup> Rosabel E. Goodman-Everard, ‘Choosing a Place for International Arbitration: The New York Option’ (1985) 2(2) Journal of International Arbitration 39,48.

<sup>206</sup> (2000) QB 451.

<sup>207</sup> Martin Hunter, ‘Ethics of the International Arbitrator’ (1987) 53 Arbitration 219, 223; M. Scott Donahey, ‘The Independence and Neutrality of Arbitrators’ (1992) 9(4) Journal of International Arbitration 31, 34; Doak Bishop and Lucy Reed, ‘Practical Considerations for Interviewing, Selecting and Challenging Party Appointed Arbitrators in International Commercial Arbitration’ (1998)14(4) Arbitration International 395; Tom Arnold, ‘Delay and Cost Booby Traps in Arbitration Practice and How to Avoid Them’ (1995) 4 Currents International Trade Law Journal 43, 45.

The problem then is how to strike a balance between parties' right to choose their arbitrators as against the ends of a fair and just process. Re-echoing Professor Paulsson's words, "I do realise that this genie – the "right" to appoint an arbitrator – cannot easily be put back in the bottle. I am ready for pragmatic solutions until my position finally prevails. Indeed, there are ways of reducing contamination."<sup>208</sup>

Even though not entirely satisfactory, the position under the English Arbitration Act 1996 and the Ghanaian ADR Act 2010<sup>209</sup> (which as we will see in Chapter Six, seems to be the general practice) possibly strikes the much needed balance since it allows parties to appoint their arbitrator while at the same time allowing the introduction of an independent third party who, by presiding over the proceedings, neutralizes any element of bias that may arise.<sup>210</sup> We come to this issue in Chapter Seven of this thesis.

Generally, arbitration proceedings are said to be faster than litigation proceedings.<sup>211</sup> Parties are also able to beat the issue of delay highlighted in Chapter Two by providing and abiding by what the ICC arbitration rules refer to as a procedural timetable.<sup>212</sup> Notable again is the fact that proceedings need not be held at the place of arbitration. Parties could, for example, opt to hold proceedings at a mutually convenient jurisdiction or even via video conferencing.<sup>213</sup>

Furthermore, as Professor Ilias Bantekas noted, parties especially in consumer related disputes can opt to resolve their dispute via online arbitration.<sup>214</sup> This again shows the fluidity of arbitration, especially as regards the developments in the commercial environment. Parties therefore need not expend unnecessary time and money travelling to a particular place just for a few hours of proceedings. This will no doubt be very useful in a country covering a total area of 356, 667 square meters (923, 768

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<sup>208</sup> Professor Jan Paulsson, 'Moral Hazard in International Dispute Resolution' (An Inaugural Lecture delivered as Holder of the Michael R. Klien Distinguished Scholar Chair, University of Miami School of Law 29 April 2010) 11 <[www.arbitrationicca.org/media/0/12773749999020/paulsson\\_moral\\_hazard.pdf](http://www.arbitrationicca.org/media/0/12773749999020/paulsson_moral_hazard.pdf)> accessed 15 April 2016.

<sup>209</sup> See Section 16(5) (b) of the English Act and Section 14(2) (b) of the Ghanaian Act.

<sup>210</sup> This is the position in practice.

<sup>211</sup> Pierre A. Karrer, 'Arbitration Saves Costs: Poker and Hide-and- Seek' (1986) 3(1) Journal of International Arbitration 35, 36.

<sup>212</sup> ICC's International Court of Arbitration Rule 2012, article 24.

<sup>213</sup> International Chamber of Commerce Arbitration Rules 2012, article 18(2).

<sup>214</sup> Ilias Bantekas (n 3) 265 -272.

square meters), with a total of thirty-six states and a population of about 177, 1555, 754 people with an expected growth rate of 2.47%.<sup>215</sup>

Arbitration is, by its very nature, a private arrangement between parties and so parties are able to avoid airing their dirty laundry in the public.<sup>216</sup> This is said to be a major advantage of arbitration.<sup>217</sup> It has however been suggested that the confidentiality of the process is not necessarily automatic<sup>218</sup> and that it in fact has its limitations.<sup>219</sup> In some instances also, confidentiality can arguably be implied into parties' agreement.<sup>220</sup> For example, the English courts seem to have adopted the idea that the pleadings, witness statements, transcripts and the award emanating from the proceedings are exempted from public view.<sup>221</sup> The courts are willing to lift this veil of confidentiality in certain instances: in the interest of justice, where there is mutual consent of parties or where it is reasonably necessary for the protection of the interest of a party to the arbitration.<sup>222</sup>

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<sup>215</sup> <[www.infoplease.com/country/nigeria.html](http://www.infoplease.com/country/nigeria.html)> accessed 17 August 2015.

<sup>216</sup> Andrew I. Okekeifere, 'Commercial Arbitration as the Most Effective Dispute Resolution Method: Still a Fact or Now a Myth' (1998) 15(4) *Journal of International Arbitration* 81, 94.

<sup>217</sup> Mark Darian-Smith and Vanin Ghosh, 'The Fruit of the Arbitration Tree: Confidentiality in International Arbitration' (2015) 81(4) *Arbitration* 360, 361; Nigel Blackaby et al, (n 120) 124.

<sup>218</sup> For a detailed discussion on the legal basis for confidentiality, the scope and duty to maintain confidentiality, see Ileana M. Smeareana, *Confidentiality in International Commercial Arbitration, International Arbitration Law Library* (Volume 22, Kluwer Law International 2011); Nigel Blackaby et al (n 5) 30.

<sup>219</sup> See also the English case of *John Forster Emmott v Michael Wilson & Partners* (2008) ECWA Civ 184 where the English Court of Appeal held that it had the power to lift the obligation of confidentiality in situations where it was reasonably necessary for the protection of the legitimate interests of an arbitrating party or where the interests of justice or public policy requires disclosure. In *AAV and ors v. AAZ* (2011) 1 SLR 1093, 1120, the English court held that a party had legitimate grounds to disclose confidential materials to the public authorities where there was reasonable cause to suspect criminal conduct. Furthermore, in *Hassneh Insurance Co of Israel v Mew* (1993) 2 *Lloyds Rep* 243, the limitations to the principle of confidentiality was also extended to include an award and the reasons contained therein and was different from the arbitration documents like transcripts, witness statements and pleadings amongst others.

<sup>220</sup> *Emmott v Micheal Wilson & Partners Ltd* (2008) 1 *Lloyds Rep.* 616.

<sup>221</sup> See Lord Justice Parker in *Dolling Baker v Merret*; See also *Ali Shipping Corp v Shipping Tragir* (1998) 1 *Lloyds Rep* 643; *Hassneh Insurance Co v Stuart J. Mew* (1993) 2 *Lloyds Rep* 243; *Emmott v Michael Wilson & Partner Ltd* (2008) ECWA Civ 184.

<sup>222</sup> *Micheal Wilson & Partners Ltd v Emmott* (2008) ECWA Civ 184; *Westwood Shipping Lines Inc v Universal Schiffahrtsgesellschaft mbh* (2013) 1 *Lloyds Rep* 670.

Upon conclusion of the arbitration proceedings, the arbitrator is expected to render an award.<sup>223</sup> Unlike most judgements of the court, which can be subject to appeal, arbitration decisions are usually final. The English Arbitration Act for example provides that “an award made by the tribunal pursuant to an arbitration agreement is final and binding both on the parties and on any persons claiming through or under them”.<sup>224</sup> On the face of it, the Model Law seems to be more flexible than the English Arbitration Act as it does not use the word “final”. The Model Law provides that “an arbitration award may be set aside...only if...”<sup>225</sup> This by implication means that except in very rare situations, an award made further to the Model Law is final. The Nigerian Supreme Court has also held in *Ras Pal Gazi v FCDA* that a valid award on a voluntary reference no doubt operates between the parties as a final and conclusive judgement upon all matters referred.<sup>226</sup> However, as with many other legal provisions, this principle of law is subject to exceptions. The Model Law, for example, allows the court to intervene in situations where a party can prove that his power of choice has been violated<sup>227</sup> or when the award in question runs contrary to an applicable state law or policy.<sup>228</sup>

A fundamental feature of arbitration is a binding decision.<sup>229</sup> This feature distinguishes it from the other “ADR” mechanisms. The usual practice is for parties to abide by the decision of their arbitrators. In a survey conducted by Queen Mary University of London in 2008, it was revealed that 89% of the time, an award debtor abided by the award voluntarily, albeit reluctantly.<sup>230</sup> However, as Micheal Mcilwrath and John Savage highlight, “getting a favourable award in an arbitration is sometimes the easy part of the dispute resolution process. Where the successful party- the award

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<sup>223</sup> J. Gillis Wetter, ‘The Conduct of the Arbitration’ (1985) 2(2) Journal of International Arbitration 7, 26; See also *Ali Shipping Corp v Shipping Trigir* (1998) 1 Lloyd’s Rep 643.

<sup>224</sup> English Arbitration Act 1996, section 58.

<sup>225</sup> UNCITRAL Model Law on International Arbitration 2006, article 34 (2)

<sup>226</sup> (2001) 7 SCM 195.

<sup>227</sup> UNCITRAL Model Law on International Arbitration 2006, article 34(2) (a).

<sup>228</sup> UNCITRAL Model Law on International Arbitration 2006, article 34(2) (b).

<sup>229</sup> Gary Born (n 151); See also Julian D.M Lew, Loukas A. Mistelis, et al, *Comparative International Commercial Arbitration* (Kluwer Law International ; Kluwer Law International, 2003) 7.

<sup>230</sup> PricewaterhouseCoopers and Queen Mary University, International Arbitration Corporate Attitudes and Practices, 2008, Available online at <<http://www.arbitration.qmul.ac.uk/docs/123294.pdf>> accessed 8 March 2015.

creditor- has been awarded money damages and the debtors' resists payment, the creditor will need to take further steps in order to actually be paid, with each step presenting another opportunity for the award debtor to resist or just delay payment."<sup>231</sup> The relevance of the courts at this point cannot be overstated.<sup>232</sup> Henry P. de Vries submits that arbitration cannot function effectively without the support of the courts.<sup>233</sup>

The New York Convention<sup>234</sup> provides what is arguably the biggest advantage of arbitration, especially to international commercial transactions.<sup>235</sup> The New York Convention was enacted to give recognition and effect to "an arbitral award made in the territory of a State other than the State where the recognition and enforcement of such awards are sought".<sup>236</sup> In other words, the Convention provides an easy way of enforcing foreign awards.<sup>237</sup> The Convention has arguably made all signatories of the convention one arbitration jurisdiction.<sup>238</sup>

It is not enough to check if the country where an award is to be enforced is a signatory to the New York Convention, it is also important to confirm that the country has not in any way limited the application of the Convention to specific states or situations. The New York Convention provides that "any State may on the basis of reciprocity declare that it will apply the Convention to the recognition and enforcement of awards

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<sup>231</sup> Micheal Mcilwrath and John Savage, *International Arbitration and Mediation: A Practical Guide* (Kluwer Law International; Kluwer Law International, 2010) 327.

<sup>232</sup> We justify some of the traditional roles being played by the court, at various in this thesis. For example, see Section 3.2 of Chapter Six.

<sup>233</sup> Henry P. de Vries, 'International Commercial Arbitration: A Transnational View' (1984) 1(1) *Journal of International Arbitration* 7,10.

<sup>234</sup> Otherwise known as the Convention of the Recognition and Enforcement of Foreign Arbitral Awards 1958; See Julian D.M Lew, Loukas A. Mistelis, et al, *Comparative International Commercial Arbitration* (Kluwer Law International ; Kluwer Law International, 2003) 7.

<sup>235</sup> Loukas A. Mistelis, 'Arbitrability- International and Comparative Perspectives: Arbitrability a National or an International Law Issue?' in Loukas A Mistelis and Stavros L. Brekoulakis (eds), *Arbitrability: International and Comparative Perspectives* (Kluwer Law International, 2009) 1.

<sup>236</sup> The New York Convention 1958, article 1.

<sup>237</sup> Andrew Chukwuemerie, (n 74) 15; Andrew I. Okekeifere (n 216) 91.

<sup>238</sup> As at the time of writing this thesis, one hundred and fifty-two States have ratified this Convention. Any of the signatories to the Convention can easily enforce an award in another signatory country, subject to any jurisdictional limitations imposed by the said signatory. A good example will be public policy. See UNCITRAL, 'Status Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958)'

< [www.uncitral.org/uncitral/en/uncitral\\_texts/arbitration/NYConvention\\_status.html](http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html)> accessed 2 October 2014.

made only in the territory of another contracting State. It may also declare that it will apply the Convention only to differences arising out of legal relationships, whether contractual or not..."<sup>239</sup> A country is therefore allowed to limit the application of the New York Convention.

## CONCLUDING REMARKS

The failure of the State-run dispute resolution system has encouraged the search for a replacement or better still an alternative. While there are a number of competing alternatives, we submitted in this chapter that arbitration remains the most viable alternative to litigation. It balances the certainty of the court system with the flexibility associated with ADR mechanisms like mediation and negotiation. In other words, arbitration provides parties with the best of both worlds.

Of course, arbitration is not without its problems.<sup>240</sup> For example, it is said to be very expensive, it is said not to take into consideration the rights and interests of third parties, amongst others.<sup>241</sup> However as we will see in subsequent chapters, the viability of arbitration definitely outweighs its disadvantages. Besides as we will see in Chapter Six, newer arbitration frameworks like the English Arbitration Act 1996 have begun to make efforts to mitigate some of these disadvantages. Little wonder the mechanism has witnessed a rapid spread across the nations of the world.

The UNCITRAL Model Law on International Commercial Arbitration<sup>242</sup> has no doubt played a major role in this development.<sup>243</sup> As of today, sixty-seven States are recorded

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<sup>239</sup> The New York Convention 1958, article 1(3).

<sup>240</sup> We highlight and discuss some of these problems while undertaking our comparative analysis of the arbitration frameworks in England, Nigeria, Ghana, the OHADA region as well as the UNCITRAL Model law in Chapter Six.

<sup>241</sup> For a general discussion on some of the perceived disadvantages of arbitration, see Guy Robin, 'The Advantages and Disadvantages of International Commercial Arbitration' (2014) 2 International Business Law Journal 13; Doug Jones, 'Techniques in Managing the Process of Arbitration' (2012) 78(2) Arbitration 140; Andrew Okekeifere (n 216) 81; Nigel Blackaby et al (n 5) 30 -37.

<sup>242</sup> It was originally introduced on 21<sup>st</sup> June 1985. However, an amended version was adopted by UNCITRAL on 7<sup>th</sup> July 2006.

<sup>243</sup> As we will come to see in the course of this thesis, this assertion is made despite the fact that it has proven to be a far more sophisticated framework especially when compared with existing legal frameworks in many African countries. See K.I Laibuta, 'ADR in Africa: Contending with Multiple Legal Orders for Wholesome Dispute Resolution' (2016) 82(1) Arbitration, 63, 65.

to have adopted the Model Law.<sup>244</sup> Examples of African countries which have domesticated the Model Law include Nigeria, Egypt, Kenya and Zambia, among many others. The courts and institutions in many African countries have also proven to be favourably disposed to arbitration.<sup>245</sup> For instance, the Nigerian courts, in their very recent decision in *Mutual Life and General Insurance Ltd v Iheme*,<sup>246</sup> clearly reaffirmed their pro-arbitration stance when they held that they will uphold any unequivocal agreement made by parties to submit their dispute to arbitration. The Ghanaian Supreme Court in *Klimatechnik Engineering Ltd v Skanska Jensen International* has also held that “the courts have a duty to support and give validity to arbitral awards properly procured”.<sup>247</sup> Generally therefore, the courts in Africa do not view arbitration as an affront to their jurisdiction.<sup>248</sup>

In Nigeria, we have two major arbitration frameworks: the Nigerian Arbitration and Conciliation Act 2004 and customary arbitration practice. In Chapter Four and Five, we will examine the extent to which both frameworks provide a practical domestic arbitration framework and by extension, a viable alternative to the court system. We believe that analysing the suitability of the existing arbitration frameworks provides a veritable platform upon which we can achieve the purpose of this thesis, which is to build or develop a bespoke domestic arbitration framework for Nigeria.

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<sup>244</sup> UNCITRAL, ‘Status UNCITRAL Model Law on International Commercial Arbitration (1985), with amendments as adopted in 2006’ <[www.uncitral.org/uncitral/en/uncitral\\_texts/arbitration/1985Model\\_arbitration\\_status.html](http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration_status.html)> accessed 1 October 2014.

<sup>245</sup> Emilia Onyema, ‘West Africa-Chapter 2; International Arbitration in the West African States’ in Lise Bosman(ed), *Arbitration in Africa; A Practitioners Guide* (Kluwer Law International 2013) 115.

<sup>246</sup> (2014) 1 NWLR (Pt 1389) 670.

<sup>247</sup> (2005-2006) SCGLR 913.

<sup>248</sup> A number of African countries including Nigeria, South Africa and Algeria are also signatories to the New York Convention 1958. This by implication means that foreign parties are able to enforce an arbitration award in any member nation. In addition to the New York Convention, seventeen French Speaking African countries have also produced the L’Organisation Pour L’Harmonisation Du Droit Des Affaires En Afrique Treaty (OHADA). This treaty provides a harmonised framework for the conduct of business in Africa by operating a uniform law regime, which upon adoption becomes applicable in its member states. By the treaty, courts in any of the participating countries are mandated to enforce an award from a member nation.

## CHAPTER FOUR

### DOMESTIC ARBITRATION IN NIGERIA

#### INTRODUCTION

In Chapter Three of this thesis, we established the viability of arbitration, first as against the other ADR mechanisms and also as against the litigation practice. We concluded by highlighting the existing arbitration frameworks in Nigeria: the Nigerian Arbitration and Conciliation Act 2004<sup>1</sup> and customary arbitration practice.<sup>2</sup> Chapter Four takes the discussion a step further by analysing the domestic arbitration practice as contained in both the aforementioned Act as well as Nigerian case law.

The significance of this instant chapter cannot be over stated; it not only analyses the domestic arbitration practice in Nigeria, it more importantly emphasises the lacunas within the law as well as justifies our call for reforms in the light of the Nigerian situation. As Dr Olawoyin rightly noted, the importance of an arbitral regime that is useful and responsive to the needs of its proposed users, is an indispensable component of the developmental activities of any nation.<sup>3</sup> Furthermore, it provides a framework upon which Nigeria's domestic arbitration practice can be compared with more developed but relevant arbitration frameworks, thus highlighting significant developments that may have occurred between 1988 and now.<sup>4</sup>

This chapter is divided into five major parts. The first part provides a brief background of statutory arbitration in Nigeria. In Part Two, we examine the concept of domestic arbitration. Contrary to traditional opinion, this writer argues that domestic arbitration is not necessarily limited to purely national or domestic matters. We opine that not only is the idea of domestic arbitration many times dependent on an

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<sup>1</sup> Chapter A18, Laws of the Federation of Nigeria 2004.

<sup>2</sup> We examine the customary arbitration practice in Chapter Five of this thesis.

<sup>3</sup> Adewale A. Olawoyin, 'Constructing the Road to Arbitral Prevalence: The Arbitration Laws of Lagos State 2009 in perspective' (2015) 18(2) international Arbitration Law Review 34,36.

<sup>4</sup> We should quickly point out that while the Act is cited as a 2004 law, it was originally introduced in 1988. The 2004 Act however stills retains its original form and content. It is not therefore unusual to see both dates being used interchangeable in the literature. Any reference to the 1988 or 2004 Arbitration and Conciliation Act, whether in the literature or in this thesis, refer to the same statute. We discuss this further in Section 1.0 of this chapter.



understanding of international arbitration, a knowledge of domestic arbitration law is also a relevant aspect of the practice of international arbitration.

In Part Three of this chapter, we introduce the reader to the practice of domestic arbitration in Nigeria. With the aid of Nigerian case law and statutory provisions, we critically examine the domestic arbitration practice in Nigeria. In the fourth part of this chapter, we analyse the 2005 report of the National Committee on the Reform and Harmonization of Arbitration and ADR Laws in Nigeria (“the Committee”).<sup>5</sup> In this report, the Committee recommended two different bills, the Federal Arbitration and Conciliation Act (FACA) and the Uniform State Arbitration and Conciliation Law (USAC), to administer international and domestic arbitration respectively. Using the Lagos State Arbitration Law 2009 as a case study, we critically examine the contents of the Uniform State Arbitration and Conciliation Law.<sup>6</sup>

In the fifth and final part of this chapter, we make a case for reforms. Specifically, we highlight and examine controversial provisions embedded in Nigeria’s domestic arbitration practice. For example, this writer argues that in view of the social and economic situation in Nigeria, *Section 1 of the Nigerian Arbitration and Conciliation Act*, which mandates that an arbitration agreement be written and signed, inhibits the growth and practice of the domestic arbitration practice in Nigeria. We also argue against *Section 2 of the same Act*, which allows courts to revoke a validly made arbitration agreement as well as criticise *Section 5 of the Act*, which gives courts the discretion to stay litigation proceedings even in the face of a validly made agreement.

## **1.0 BACKGROUND**

### **1.1 Historical Background to Statutory Arbitration in Nigeria**

Despite its very scanty use, Nigeria’s domestic arbitration practice dates back to her colonial days.<sup>7</sup> The first statutory arbitration framework in Nigeria was the *Arbitration*

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<sup>5</sup>In September 2005, the Honourable Attorney General of the Federation, Chief Bayo Ojo, FCI Arb (as he then was), put together a fifteen person committee to review Nigeria’s arbitration and ADR laws.

<sup>6</sup>As we will see, the Uniform State Arbitration and Conciliation Law was put in place as a kind of model law, to guide the States in Nigeria in the making of their arbitration laws.

<sup>7</sup>B.A Bukar, ‘Legal Framework For the Resolution of International Commercial Disputes: An examination of Nigeria’s Arbitration Laws’ (1999) 16(1) *Journal of International Arbitration* 47.

*Ordinance of 1914*. This framework, which was modelled after the *English Arbitration Act 1889* was introduced on 31<sup>st</sup> of December 1914, subsequent to the amalgamation of the Northern and Southern Protectorate of Nigeria. The *1914 Ordinance* was however replaced by the *Arbitration Ordinance of 1958*,<sup>8</sup> which was then in force until 14<sup>th</sup> of March 1988 when the Federal Military Government introduced the *Arbitration and Conciliation Decree No 11 of 1988*.<sup>9</sup> Professor Koyinsola Ajayi pointed out that the aforementioned Decree was promulgated as one of the means to improve the investment climate in Nigeria.<sup>10</sup>

This Decree was modelled after the United Nations Commission on International Trade Law (“UNCITRAL”) Model Law on International Commercial Arbitration.<sup>11</sup> This was a departure from Nigeria’s usual practice of adopting English law.<sup>12</sup> The said Arbitration Decree also domesticated the *New York Convention 1958* in Nigeria.<sup>13</sup>

This *UNCITRAL Model Law* (“the Model Law”) was introduced by the UNCITRAL,<sup>14</sup> an organization of the General Assembly of the United Nations on 21<sup>st</sup> of June 1985. The Model Law was introduced to provide a unified legal framework for the fair and efficient settlement of disputes arising in international commercial relations.<sup>15</sup> The General Assembly of the United Nation did not however adopt this law until the 11<sup>th</sup> of December 1985, after it had consulted with arbitration experts and institutions. The Model Law was nonetheless revised in 2006.

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<sup>8</sup> Chapter 13 of the Law of the Federation of Nigeria and Lagos 1958.

<sup>9</sup> Paul Idornigie, ‘Overview of ADR in Nigeria’ (2002) 73(1) *Arbitration* 73; Andrew Chukwuemerie, ‘Salient Issues in the Law and Practice of Arbitration in Nigeria’ (2006) 14 *African Journal of International and Comparative Law* 1,6.

<sup>10</sup> Koyinsola Ajayi, ‘Nigeria’s New Arbitral and Conciliatory Process’ (1989) 7(9) *International Banking Law* 140.

<sup>11</sup> The Law also incorporates the UNCITRAL Model Rules.

<sup>12</sup> Gaius Ezejiiofor, ‘The Nigerian Arbitration and Conciliation Act: A Challenge to the Court’ (1993) *January Journal of Business Law* 82,84.

<sup>13</sup> See the Second Schedule of the Nigerian Arbitration and Conciliation Act.

<sup>14</sup> This body was established in 1966 to among other things, assist the UN to improve the legal framework for international trade and non-legislative texts for use by commercial parties in negotiating transactions. UNCITRAL legislative texts address international sales of good, international commercial dispute resolution including both arbitration and conciliation, electronic commerce, insolvency and security interests.

<sup>15</sup> UNCITRAL Model Law on International Commercial Arbitration 1985 (With amendments as adopted in 2006) <[www.uncitral.org/pdf/english/texts/arbitration/ml-arb/07-86998\\_Ebook.pdf](http://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/07-86998_Ebook.pdf)>

By virtue of certain constitutional provisions, the aforementioned *Arbitration and Conciliation Decree No 11 of 1988* has been converted into an Act of the National Assembly and is now known as the Arbitration and Conciliation Act (“the Arbitration Act or the Act”).<sup>16</sup> This change has however not affected the content, scope and structure of the law itself. This conversion arose as a result of the change in dispensation from military to democratic rule on 29<sup>th</sup> May 1999.<sup>17</sup> Rather than discarding all pre-existing laws, *Section 315(1) (a) of the Constitution*<sup>18</sup> of the Federal Republic of Nigeria provides that “...an existing law shall have effect...and shall be deemed to be an Act of the National Assembly”. *Section 315(4)(b) of the Constitution* goes ahead to define existing laws to mean “any rule of law or enactment or instrument whatsoever which is in force immediately before the date when this section comes into force or which having been passed or made before that date, comes into force after that date...” This way, rather than enact brand new laws for every facet, the Constitution converted existing military laws to democratic laws.

There was a failed attempt to reform the Act in 2005. The Federal Government put together a group known as the Reform and Harmonization of Arbitration and ADR Laws in Nigeria Committee. In the concluding parts of this chapter, we examine the Committee’s report as it relates to domestic arbitration.

## **2.0 DEFINING THE SCOPE OF DOMESTIC ARBITRATION**

### **2.1 Domestic Arbitration in General**

A proper definition of domestic arbitration is very integral to the success of this thesis, mainly because we ultimately intend to propose a suitable domestic arbitration framework for Nigeria. In order to achieve this objective, it is important to understand and properly define the concept of domestic arbitration and its scope in Nigeria.

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<sup>16</sup> Chapter A18, Laws of the Federation of Nigeria 2004.

<sup>17</sup> After a long Military rule dating back to 1983, General Abdulsalam Abubakar handed over to the elected Civilian government of former President, General Olusegun Obasanjo on May 29 1999. Prior to the handover, the Military government had come up with the existing 1999 Constitution, which is largely based on the 1979 Constitution of Nigeria.

<sup>18</sup> 1999 Constitution of the Federal Republic of Nigeria.

In defining domestic arbitration, it is easy to assume that it refers to any arbitration without a foreign element. A commentator like Charles Manzoni adopted this idea when he submitted that domestic arbitration was concerned with purely national or domestic matters. In his opinion, it did not matter whether the relevant nation was Thailand, England or Germany. If everything relating to the arbitration is connected to one specific jurisdiction, then the arbitration is a domestic arbitration.<sup>19</sup> Professor Paul Idornigie also opines that in distinguishing between international and domestic arbitration, a dispute should be categorised as international by virtue of its nature and/or the parties involved.<sup>20</sup> Even the widely acclaimed Redfern and Hunter noted that, “the term international is used to mark the difference between arbitrations which are purely national or domestic and those which in some way transcend national boundaries and so are international, or in the terminology adopted by Judge Jessup, transnational.”<sup>21</sup> The popular opinion therefore seems to be that domestic arbitration is limited to national or domestic matters.<sup>22</sup>

While the aforementioned definitions may in many instances be true, we will in the course of this section come to see that it is in fact impossible to give an encompassing or generally accepted definition of domestic arbitration. Unlike international arbitration, there are no generally accepted model frameworks specifically devoted to promote and enforce the practice of domestic arbitration.<sup>23</sup> As we will also come to see, various jurisdictions have different definitions of what amounts to domestic arbitration. Unfortunately, the widely acclaimed text books on arbitration provide little guidance as they seem to be more focused on international arbitration. These

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<sup>19</sup> Charles Manzoni, ‘International Arbitration: The key Elements’ [www.39essex.com/docs/articles/CMZ\\_International\\_Arbitration\\_050504.pdf](http://www.39essex.com/docs/articles/CMZ_International_Arbitration_050504.pdf) accessed 14 August 2015.

<sup>20</sup> Paul Idornigie, ‘The 1988 Nigerian Arbitration and Conciliation Act: Need For Review?’ (2003) 6(3) *International Arbitration Law Review* 50,53.

<sup>21</sup> Nigel Blackaby et al, *Redfern and Hunter on International Arbitration* (5<sup>th</sup> Edition, Oxford Press 2009) 9.

<sup>22</sup> See also Hans Smit, ‘A National Law’ (1988-1989) 63 *Tulane Law Review* 629; Asouzu, *International Commercial Arbitration in African States: Practice, Participation and Institutional Development* (Cambridge University Press 2001) 160.

<sup>23</sup> UNCITRAL Model law 1985, article 1(1).

provide very little direction for domestic arbitration as both practices arguably operate under very different considerations.<sup>24</sup>

The *International Arbitration and Mediators, Australia Rules* (IAMAR) provides a simple but very apt definition of domestic arbitration when it defines it “as any arbitration which is not an international arbitration”.<sup>25</sup> This very simple definition when examined critically is both reasonable and practical. If we assume that arbitration can either be international or domestic, it can also be implied that one can define either of these two types of arbitration by defining the other.<sup>26</sup> In other words, since it is fairly easy to actually define the scope of international arbitration, it is safe to assume that any arbitration practice that does not fall under the umbrella of international arbitration should ordinarily fall under domestic arbitration.

What then is international arbitration? The Model Law provides what is arguably the most comprehensive definition of international arbitration. It provides that “an arbitration is international if;

- a. The parties to an arbitration agreement have, at the time of conclusion of that agreement, their places of business in different States or;
- b. One of the following is situated outside the State in which the parties have their place of business;
  - i. The place of arbitration if determined in, or pursuant to, the arbitration agreement;

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<sup>24</sup> Kenneth Glasner, QC, ‘A lawyers Primer in Drafting Arbitration Claims for a Domestic Arbitration’ (2010) 68(2) Advocate Vancouver 869, 870.

<sup>25</sup> Article 2 of the International Arbitrators and Mediators Australia 2007 [www.iama.org.au/sites/default/files/resources/rules-guidelines/IAMAAR\\_FastTrack07.pdf](http://www.iama.org.au/sites/default/files/resources/rules-guidelines/IAMAAR_FastTrack07.pdf) accessed 22 November 2014.

<sup>26</sup> Admittedly, in the case of African countries like Nigeria and Ghana, we also have a third type of arbitration called customary arbitration. Going by this IAMAR definition, to the extent that international and customary arbitration are clearly defined, we can then infer that any residual system is known as domestic arbitration.

- ii. Any place where a substantial part of the obligations of the commercial relationship is to be performed or the place with which the subject matter of the dispute is most closely connected; or
- c. The parties have expressly agreed that the subject matter of the arbitration agreement relates to more than one country. “<sup>27</sup>

From this definition of international arbitration, one can infer that for the purposes of the Model Law (and in any jurisdiction that has adopted this provision of the Model Law), domestic arbitration refers to any arbitration in which parties have registered and run their business in (or are nationalities of) the same State, have their place of business in (or are nationalities of) the same place as the seat of arbitration and the subject matter of the dispute is in one way or the other closely related to the place of business (or nationality) of both parties.

Jurisdictions like the United Kingdom have adopted the Model Law’s implied definition of domestic arbitration in part. In *Section 85 of the English Arbitration Act*,<sup>28</sup> a domestic arbitration agreement was expressly defined as “an arbitration agreement to which none of the parties is:

- a. An individual who is a national of, or habitually resident in, a State other than the United Kingdom, or
- b. A body corporate which is incorporated in, or whose central control and management is exercised in, a State other than the United Kingdom, and under which the seat of the arbitration (if the seat has been designated or determined) is in the United Kingdom.”

All these definitions in a way seem to adopt the traditional view mentioned above. The confusion however sets in when we critically examine certain provisions of the New York Convention. It is generally accepted that the New York Convention is only applicable to the enforcement of international arbitration awards. In defining its

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<sup>27</sup> UNCITRAL Model Law; article 1(3).

<sup>28</sup> English Arbitration Act 1996.

scope, the Convention provides that “it shall apply to arbitral awards not considered as domestic awards in the State where their recognition and enforcement are sought”.<sup>29</sup>

Two things can be deduced from the aforementioned provision of the New York Convention; first is that the definition of what qualifies to be called domestic arbitration varies between jurisdictions. For example, Croatia adopts what may be considered a very controversial definition of domestic arbitration. The Croatian Arbitration Act,<sup>30</sup> which clearly limits the scope of its application to domestic arbitration<sup>31</sup> proceeds to define domestic arbitration as an “arbitration that has place in the territory of the Republic of Croatia”.<sup>32</sup> This in other words means that any arbitration with a seat in Croatia is by virtue of Croatian law domestic, notwithstanding any foreign element embedded in the arbitration.<sup>33</sup> This definition clearly negates the traditional definition of domestic arbitration as defined above. Other countries like China have adopted the “more traditional definition” of domestic arbitration.<sup>34</sup> As we will see in Section 2.2 of this chapter, Nigeria has its own completely different definition of what qualifies as domestic arbitration.

The second point which can be inferred from the said *Article 1(1) of the New York Convention* is that the definition of domestic arbitration could be relevant during the recognition and enforcement of an international arbitration award, since the aforementioned provision limits the application of the Convention to an arbitral award “not considered as domestic awards in the State where their recognition and enforcement are sought”. It is submitted that this provision of the New York

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<sup>29</sup> New York Convention 1958, article 1(1)

<sup>30</sup> Laws on Arbitration, Official Gazette 88/2001 of October 11, 2001. It came into force on October 19, 2001 <[www.vsrh.hr/CustomPages/Static/HRV/Files/Legislation\\_Law-Arbitration-RC.pdf](http://www.vsrh.hr/CustomPages/Static/HRV/Files/Legislation_Law-Arbitration-RC.pdf)> accessed 22 November 2014.

<sup>31</sup> Croatian Arbitration Act 2001, article 1.

<sup>32</sup> *ibid*, article 2.

<sup>33</sup> Hrvoje Bardek, CMS, ‘Arbitration in Croatia’

<[https://eguides.cmslegal.com/pdf/arbitration\\_volume\\_I/CMS%20GtA\\_Vol%20I\\_CROATIA.pdf](https://eguides.cmslegal.com/pdf/arbitration_volume_I/CMS%20GtA_Vol%20I_CROATIA.pdf)> accessed 12 December 2014.

<sup>34</sup> Ulrike Glück and Falk Lichtenstein, CMS, ‘Arbitration in the People’s Republic of China’

<[https://eguides.cmslegal.com/pdf/arbitration\\_volume\\_I/CMS%20GtA\\_Vol%20I\\_CHINA.pdf](https://eguides.cmslegal.com/pdf/arbitration_volume_I/CMS%20GtA_Vol%20I_CHINA.pdf)> accessed 22 November 2014.

Convention is very subjective and gives room for problematic interpretations. An award debtor can for example oppose an application to enforce a supposed international arbitration award by arguing that the said award qualifies as a domestic award in the State where the recognition and enforcement is sought even when the award meets all other requirements of an international arbitration award, thus defeating an otherwise valid arbitration award.

This particular provision of the New York Convention in a way defeats one of the widely acclaimed advantages of the Convention (and by extension, arbitration), which is the enforcement of an international arbitral decision in member states. This position emphasises the need for an experienced legal practitioner when drafting contractual and arbitration agreements in order to avoid this rare but possible pitfall.

## **2.2 Nigeria's Definition of Domestic Arbitration**

Like many other jurisdictions, the Nigerian Arbitration Act does not provide a definition of domestic arbitration. It however defines and clearly states the scope of international arbitration; a definition of domestic arbitration can therefore be implied from same. In *Section 57 of the Nigerian Arbitration Act*,<sup>35</sup> the draftsman adopts the aforementioned Model Law's definition of international arbitration. The draftsman however adds a further sub-section when it provides that an "arbitration is international if...the parties despite the nature of the contract expressly agree that any dispute arising from the commercial transaction shall be treated as an international arbitration."<sup>36</sup> This provision in other words gives parties the autonomy to legally convert what qualifies and fits the traditional description of domestic arbitration into an international arbitration through a mere agreement.

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<sup>35</sup> Chapter A18, Laws of the Federation of Nigeria, 2004.

<sup>36</sup> Arbitration and Conciliation Act; section 57(2)(d).



It is difficult to comprehend the idea behind this provision.<sup>37</sup> No doubt parties have been able to benefit from this conversion process. For example, Akpata and Atake<sup>38</sup> have suggested that this conversion process allows parties to a domestic arbitration to avoid the restriction imposed upon them by *Article 4 of the Arbitration Rules* (“the Rules”).<sup>39</sup> *Article 4 of the Rules* provides that “the parties may be represented or assisted by legal practitioners of their choice.”<sup>40</sup> *Section 18 of the Nigerian Interpretation Act* provides that “in an enactment, the following expressions have the meaning hereby assigned to them...legal practitioner has the meaning assigned to it by the *Legal Practitioners Act*”<sup>41</sup> The combined effect of *Section 24 and Section 2 of the Legal Practitioners Act*<sup>42</sup> defines a legal practitioner as any barrister or solicitor whose name is on the Nigerian Supreme Court’s Roll. Commentators have therefore argued that parties in an arbitration which is domestic can avoid the restrictions imposed upon them by *Article 4 of the Rules* by stipulating that their arbitration is international.<sup>43</sup>

Notwithstanding the usefulness of *Section 57(2) (d) of the Nigerian Act* in avoiding “onerous” provisions like that of *Article 4 of the Rules*, it is submitted that this provision of the Act is taking the concept of party autonomy too far.<sup>44</sup> No doubt, there is need to allow parties the freedom to decide on issues involving their everyday life. This idea is encapsulated in the principle of party autonomy, which like we have seen is one of the fundamental ideas behind the practice of arbitration.

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<sup>37</sup> Okezie Chukwumerejie, *Choice of Law in International Commercial Arbitration* (Praeger Publishers 1994) 5.

<sup>38</sup> Oghogho Akpata and Adewale Atake, ‘Domestic Arbitration in Nigeria; Can Foreign Counsel still run the course’

<[www.templarslaw.com/media/DOMESTIC%20ARBITRATION%20IN%20NIGERIA%20%20CAN%20FOREIGN%20COUNSEL%20STILL%20RUN%20THE%20RACE.pdf](http://www.templarslaw.com/media/DOMESTIC%20ARBITRATION%20IN%20NIGERIA%20%20CAN%20FOREIGN%20COUNSEL%20STILL%20RUN%20THE%20RACE.pdf)> accessed 14 December 2014

<sup>39</sup> See Schedule 1 of the Arbitration and Conciliation Act, Cap A18, Laws of the Federation of Nigeria, 2004. By virtue of Section 15 of the aforementioned Act, the Nigerian Arbitration Rules is applicable in domestic arbitration proceedings in Nigeria. Section 53 of the Nigerian Arbitration Act allows parties to choose between the Nigerian Arbitration Rules, the UNCITRAL Arbitration Rules or any arbitration rule of their choice.

<sup>40</sup> Dakas Clement Dakas, ‘The Legal Framework For the Recognition and Enforcement of International Commercial Arbitration Awards in Nigeria’ (1998) 15(2) *Journal of International Arbitration* 95,112.

<sup>41</sup> Chapter 123, Laws of the Federation of Nigeria 2004.

<sup>42</sup> Chapter L11, Laws of the Federation of Nigeria 2004.

<sup>43</sup> Oghogho Akpata and Adewale Atake (n 38).

<sup>44</sup> Okezie Chukwumerejie (n 37) 5.

This writer however submits that the exercise of this right of autonomy should be within prescribed and reasonable legal boundaries.<sup>45</sup> Even the principle of party autonomy acknowledges the need for boundaries.<sup>46</sup> Besides, one of the fundamental reasons or objectives behind law in general is to ensure a measure of control and standard over a particular people.<sup>47</sup> Everyone cannot be expected to act or do the right thing all the time. A situation where parties are allowed to administer their life without a measure of control will only lead to chaos and confusion.

By extension, a situation where parties are allowed to convert an arbitration that is otherwise domestic by law, into an international arbitration without any form of restriction or guidance is open to abuse, especially in a country like Nigeria. Experience has shown that even in situations where there is a clear and unambiguous law or judgement of the court, Nigeria still struggles with issues involving abuse of power and disregard for the rule of law.<sup>48</sup> The existence of a provision like *Section 57(2) (d) of the Nigerian Act*, especially at a time when the use of arbitration is just developing, can only do more harm than good.

Besides, there is a reason for this distinction between domestic and international arbitration and a situation where parties are able to ignore this distinction on a whim and more importantly, without any form of legal guidance is unacceptable. This writer therefore submits that even if *Section 57(2) (d) of the Nigerian Act* is to be retained as the law, it must be within prescribed parameters.

### **3.0 AN INTRODUCTION TO THE DOMESTIC ARBITRATION PRACTICE IN NIGERIA**

In discussing the domestic arbitration practice in Nigeria, we would approach this discussion from what Redfern and Hunter have regarded as the fundamental elements of arbitration.<sup>49</sup> These are;

#### **1. The agreement;**

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<sup>45</sup> We discuss the concept of party autonomy in Section 3.0 of Chapter Three.

<sup>46</sup> Nigel Blackaby et al (n 21) 441.

<sup>47</sup> Twining and Miers, *How to do things with Rules* (4<sup>th</sup> edn, Butterworths 1999) 123.

<sup>48</sup> We highlighted some of these experiences in Section 3.2 of Chapter Two.

<sup>49</sup> Nigel Blackaby et al (n 21) 14.

2. The need for a dispute;
3. Starting an arbitration: the appointment of an arbitral tribunal;
4. The arbitral proceedings;
5. The decision of the Tribunal;
6. Enforcement of the award.

### 3.1 The Agreement to Arbitrate

The Supreme Court of Nigeria has held in *Commerce Assurance Limited v Alli*<sup>50</sup> that parties to a dispute have a choice to determine the method by which their dispute will be administered. They may resort to the normal machinery for the administration of justice by going to the courts of the land. Alternatively, they may choose to appoint an arbitrator to act as their decision maker. In *Ras Pal Gazi v FCDA*,<sup>51</sup> the court held that parties to a dispute have a choice, they may go to court and have their dispute determined both as to the fact and to law, or they may choose an arbitrator to settle their dispute. In exercising their power of autonomy, parties would be expected to weigh the pros and cons of both positions before deciding on arbitration.<sup>52</sup> When parties opt for arbitration, they will not be allowed to unilaterally opt out at a later date.<sup>53</sup>

To properly constitute a valid arbitration, there must be a clear and unequivocal agreement to submit the matter to arbitration.<sup>54</sup> According to Nigerian law, this agreement must not only be in writing, it must also be signed by both parties.<sup>55</sup> The agreement can either be made before or after the dispute has arisen. Like many other jurisdictions, Nigerian parties may decide to include this agreement as one of the

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<sup>50</sup> (1992) 4 SCNJ 145.

<sup>51</sup> (2001) 7 SCM 195.

<sup>52</sup> Chukwuemeka E. Ibe, 'Party Autonomy and the Constitutionality of Nigerian Arbitration and Conciliation Act 1988, Section 7(4) and 34 in Commenting on Agip Oil Co Ltd c Kremmer and others, Chief Felix Ogunwale v Syrian, Arab Republic and Bendex Engineering Ltd v Efficient Petroleum (Nigeria) Ltd' (2011) 28(5) Journal of International Arbitration 493,495.

<sup>53</sup> *The Owners of the M.V. Lupex V. Nig. Overseas Chartering & Shipping Ltd* (2003) 10 SCM 71.

<sup>54</sup> *Commerce Assurance Limited v Alli* (1992) 4 SCNJ 15.

<sup>55</sup> Arbitration and Conciliation Act, section 1 (1). As we argue further in this thesis, this provision is unsuitable for a developing country like Nigeria.

clauses in their head contract. This arbitration agreement would be construed in the light of the circumstances in which it was made.<sup>56</sup>

Nigeria's arbitration law recognizes the principle of separability.<sup>57</sup> The Act provides that "an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract and a decision by the arbitral tribunal that the contract is null and void shall not affect ipso jure the validity of the arbitration clause".<sup>58</sup> In *Nigerian National Petroleum Corporation v Klifco Nigeria Limited*, the Supreme Court clearly reiterated this principle when it stated that the arbitration clause is regarded as separate. So where there is novation, purpose of contract may fail but the arbitration clause survives.<sup>59</sup> In another case, the Supreme Court rightly stated that an arbitration clause in a written contract is quite distinct from the other clauses, whereas the other clauses in a written contract set out obligations which the parties undertake towards each other, the arbitration clause merely embodies the agreement of both parties that if any dispute should occur with regards to the obligations which the other party has undertaken to the other, such dispute should be settled by a tribunal of their own constitution and choice.<sup>60</sup>

This written agreement can take different forms. According to the Nigerian Arbitration Act, it can either be signed by all the parties involved<sup>61</sup> or contained in an exchange of letters, telex, telegrams or other means of communication.<sup>62</sup> An arbitration agreement can also be inferred from an exchange of point of claims or defence in which the existence of an arbitration agreement is not disputed.<sup>63</sup>

The general position, which has its roots in contract law is that an arbitration agreement can only be revoked by a joint agreement of the parties.<sup>64</sup> Therefore, the death of one of the parties does not release either party from the obligation to

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<sup>56</sup> *The Owners of the M.V Lupex v. Nigerian Overseas Chartering and Shipping Limited* (2003) 10 SCM 71.

<sup>57</sup> We discuss this doctrine in more detail in Section 3.2 of Chapter Six.

<sup>58</sup> Arbitration and Conciliation Act, section 12 (2).

<sup>59</sup> *Nigerian National Petroleum Corporation v Klifco Nigeria Limited* (2011) 4 SC (Pt 1) 108.

<sup>60</sup> *Royal Exchange Assurance v. Bentworth Finance (Nig) Ltd* (1976) 11 SC 107.

<sup>61</sup> Arbitration and Conciliation Act, section 1(1)(a).

<sup>62</sup> *ibid* section 1(1)(b).

<sup>63</sup> *ibid* section 1(1)(c).

<sup>64</sup> This is also the position in Nigeria, see *ibid* section 2.

arbitrate.<sup>65</sup> Interestingly, the Nigerian Arbitration Act also gives the courts undefined and unrestricted powers to revoke an arbitration agreement by providing that “...an arbitration agreement shall be irrevocable except by agreement of parties or leave of the court or judge.”<sup>66</sup> In other words, a judge is able to revoke a validly made domestic arbitration agreement.<sup>67</sup> Notwithstanding the latter part of the aforementioned provision, it is clear from the initial part of that *Section 2 of the Nigerian Act* that the general rule is that an arbitration agreement is binding.

An interesting provision of the Nigerian Act is *Section 5*, which in a way qualifies the general rule enunciated in *Section 2 of the Act*. *Section 5(1) of the Act* provides that “if any party to an arbitration agreement commences any action in any court with respect to any matter which is the subject of an arbitration agreement, any party to the arbitration agreement may at any time after appearance and before delivering any pleadings or taking any other steps in the proceedings, apply to the court to stay the proceedings”.<sup>68</sup> In other words, the other party must act timeously. Similarly, in *Fawehinmi Construction v OAU*,<sup>69</sup> the Supreme Court held that when parties enter into a contractual relationship and there is an arbitration clause which stipulates that the parties must first submit to arbitration before trial in court, it is natural for the defendant in a case where the other party has filed a suit, to seek for an order of stay of proceedings pending arbitration and this does not amount to submission to trial.

The court therefore has power to stay proceedings in an action brought to it in breach of an agreement to settle a matter by arbitration.<sup>70</sup> The court will only grant this application if it is satisfied that there are no sufficient reasons why the matter should not be referred to arbitration and that the applicant was at the time when the action was commenced, willing and at the time of application, still willing to properly

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<sup>65</sup> Arbitration and Conciliation Act, section 3.

<sup>66</sup> *ibid* section 2.

<sup>67</sup> This is another problematic provision and is discussed in more detail in Section 5.2 of this chapter.

<sup>68</sup> See also the case of *M.V Lupex v. Nigerian Overseas Chartering and Shipping Limited* (2003) 10 SCMB71

<sup>69</sup> (1998) 5 SCNJ 52.

<sup>70</sup> *K.S.U.D.B v. Fanz Construction Co ltd* (1990) 6 SC 103.

conduct the arbitration proceedings.<sup>71</sup> Interestingly, the Act does not prescribe any such condition for the recognition of an international arbitration agreement.<sup>72</sup>

### 3.2 The Need for a Dispute

Under Nigerian law, not every dispute qualifies to be administered by arbitration. It can be implied from a general perusal of the Act that certain types of dispute cannot be administered via arbitration.<sup>73</sup> In other words, it is possible for a disagreement arising and existing between parties not to qualify as an arbitrable dispute; this differs from jurisdiction to jurisdiction. It is at this point that the principle of arbitrability becomes relevant.

It is submitted that the issue of arbitrability is one of those arguments that can either be made under *Section 5(2) (a) of the Act* or against the validity of an arbitration agreement generally. It should be recalled that *Section 5(2) (a)* provides that the court may grant an application for stay of proceedings if it is satisfied that there is no reason why the matter should not be referred to arbitration in accordance with the agreement. Flowing from this, it is reasonable to state that the arbitrability (or otherwise) of the issues involved in the dispute is one of the considerations which can be put before the court and upon which the court may refuse to enforce an arbitration agreement. The issue of arbitrability can therefore be decided both by the Superior Courts in Nigeria<sup>74</sup> or by the arbitration tribunal.<sup>75</sup> *Section 35 of the Arbitration and Conciliation Act* provides that the Act “...shall not affect any other law by virtue of which certain disputes may not be submitted to arbitration or may be submitted to arbitration only in accordance with the provisions of that or another law”.<sup>76</sup> This provision differentiates between disputes which are one hundred percent non arbitrable and disputes which are only arbitrable when certain conditions are met.

Unfortunately, the Act does not list the disputes that fall under any of these categories neither does it lay down any qualifications that should assist the court in determining

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<sup>71</sup> Arbitration and Conciliation Act, section 5 (2)(a)(b).

<sup>72</sup> *ibid* section 4(1).

<sup>73</sup> *ibid* section 35.

<sup>74</sup> *ibid* section 5(2)(a), 12(4).

<sup>75</sup> *ibid* section 12(1).

<sup>76</sup> *ibid* section 35 (a)(b).

questions on arbitrability. This development has led commentators like Professor Andrew Okekeifere to argue that virtually all disputes are arbitrable in Nigeria.<sup>77</sup>

However, as Professor Paul Idornigie rightly posited, this statement without some form of qualification amounts to hasty generalisation.<sup>78</sup> For one, it is obvious that non-commercial disputes are not arbitrable.<sup>79</sup> Furthermore the Nigerian courts have in *Kano State Urban Development Board v Fanz Construction Co* held that ‘an indictment for an offence of a public nature cannot be the subject of an arbitration agreement.’<sup>80</sup> In other words disputes relating to criminal law and public policy are non arbitrable.

Moreover in *BJ Exports & Chemical Processing Co. v. Kaduna Refining and Petrochemical Co*<sup>81</sup>, the Nigerian Court of Appeal held that disputes or claims bordering on fraud are not arbitrable.<sup>82</sup> Professor Paul Idornigie has rightly argued that in such a situation, a party who opposes an arbitration claim bordering on fraud may successfully institute an action further to *Section 2 of the Act*, seeking for the leave of the court to revoke the arbitration agreement.<sup>83</sup> Unfortunately, case law provides little guidance on what the phrase bordering on fraud means or encompasses and so this is open to abuse since all it takes to defeat an arbitration agreement is to allege fraud.<sup>84</sup>

In a situation in which only a part of the arbitration agreement is not arbitrable, it is submitted that drawing on the idea behind *Section 29(2) of the Nigerian Act*, it is possible for the court to separate the inarbitrable part of the agreement from the arbitrable part. The said *section* provides that “the court may set aside an arbitral

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<sup>77</sup> Andrew Okekeifere, ‘Public Policy and Arbitrability under the UNCITRAL Model Law’ (1999) 2 Int’l A.L.R. 70, 74 9.

<sup>78</sup> Paul Idornigie, ‘The Principle of Arbitrability in Nigeria Revisited’ (2004) 21 Journal of International Arbitration 279,283.

<sup>79</sup> See the Preamble to the Nigerian Arbitration and Conciliation Act 2004, which defines the scope of the Act as follows: “An Act to provide a unified legal frame work (sic) for the fair and efficient settlement of commercial disputes by arbitration and conciliation, and to make applicable the Convention on the Recognition and Enforcement of Arbitration Awards (New York Convention) to any award made in Nigeria or any contracting State arising out of International Commercial Arbitration.

<sup>80</sup> (1990) 4 NWLR (Pt 142) 1.

<sup>81</sup> Unreported judgement of the Court of Appeal delivered by Justice Mahmud Mohammed, Isa Ayo Salami and Dalhatu Adamu; Paul Idornigie (n 79).

<sup>82</sup> This is because such claims have an element of criminal law.

<sup>83</sup> Paul Idornigie (n 78) 281.

<sup>84</sup> We discuss the English case of *Fiona Trust v Privalov* (2007) All ER (D) 233 in Section 3.2 of Chapter Six.

award if the party making the application furnishes proof that the award contains decisions on matters which are beyond the scope of submission to arbitration so however (sic) that if the decisions on matters submitted to arbitration can be separated from those not submitted, only that part of the award which contains decisions on matters not submitted may be set aside". Flowing from the above, either party to an application under *Section 2 of the Arbitration Act* can therefore argue against the total revocation of the arbitration agreement by asking the court or the tribunal to separate the arbitrable part from the inarbitrable part.

This writer however disagrees with Professor Paul Idornigie when he opines that the limit of what is arbitrable "...is determined by case law".<sup>85</sup> This assertion is clearly not true. No doubt and as we have seen above, case law plays an important role in defining arbitrability. However, this role is definitely not exclusive. It is clear that the aforementioned *Section 35 of the Act* leaves this open. Professor Mustapha Akanbi<sup>86</sup> has rightly noted that statutes regulating intellectual property such as the *Trademarks Act*<sup>87</sup>, *Patents and Design Act*<sup>88</sup> and the *Copyrights Act*<sup>89</sup> provide for administrative settlement or litigation, to the exclusion of arbitration.

Another interesting argument that may arise from this discussion on arbitrability relates to certain areas of law that have been placed within the exclusive jurisdiction of particular courts.<sup>90</sup> For example, *Section 251 of the Nigerian Constitution* provides that the "...the Federal High Court shall have and exercise jurisdiction to the exclusion of any other court on civil causes and matters relating to..." specific matters like banking, tax, intellectual property, aviation, arms and ammunition, drugs and poison among many others.<sup>91</sup> The question then is, can an arbitral tribunal properly assume jurisdiction in view of the provisions of a law like *Section 251 of the Constitution*?

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<sup>85</sup> Paul Idornigie (n 78) 281.

<sup>86</sup> Muhammed Mustapha Akanbi, 'Contenting without being Contentious: Arbitration, Arbitrators and Arbitrability' (Inaugural lecture delivered on 13<sup>th</sup> of November 2014 at the University of Ilorin, Nigeria. <[www.unilorin.edu.ng/UIIL/152.pdf](http://www.unilorin.edu.ng/UIIL/152.pdf)> accessed 31 December 2014.

<sup>87</sup> Trademarks Act 1965, Chapter 436, Laws of the Federation of Nigeria 2004, sections 50-56, 67(1).

<sup>88</sup> Patents and Design Act 1970, Chapter 344, Laws of the Federation of Nigeria 2004, section 26.

<sup>89</sup> Copy Rights Act 1988, Chapter 68, Laws of the Federation of Nigeria.

<sup>90</sup> 1999 Constitution of the Federal Republic of Nigeria, section 251(1).

<sup>91</sup> *ibid* section 251(1)(a)-(s).



It is submitted that this provision does not in any way affect the jurisdiction of an arbitration tribunal over any of these matters.<sup>92</sup> No doubt, by virtue of the nature of some of the aforementioned subject areas like tax, ammunition, custom and excise, they will in the opinion of this writer, be more suited for the courts. However, *Section 251 of the Constitution* does not provide the much needed backing for this opinion. For one, it is clear that this provision of the Constitution was made to regulate the relationship between the courts as the jurisdiction was bestowed on the Federal High Court “to the exclusion of any other court in civil causes and matters...”.<sup>93</sup> The Nigerian Supreme Court has held in *Sunday Ufombo & anor v Wosu Ahuchaogu & ors* that an arbitral tribunal does not qualify as a court, not even an inferior court. According to the court, an arbitration tribunal is only a convenient forum of settling parties’ disputes.<sup>94</sup> Going by a strict interpretation of the law therefore, this provision does not extend to arbitral tribunals.

### **3.3 Starting an Arbitration: The Appointment of an Arbitral Tribunal**

*Article 3 of the Arbitration Rules* states that the claimant initiates an arbitration proceeding by giving the other party a Notice of Arbitration. The arbitration proceedings shall be deemed to commence on the date on which the Notice of Arbitration is received by the respondent. The Rules go ahead to list the contents of a Notice of Arbitration.<sup>95</sup> Usually, the Notice contains a general summary of the claim, an indication of the amount involved and the reliefs or remedy sought.<sup>96</sup>

Parties also have the option to include information relating to the constitution of their arbitration tribunal and may decide to include this in the Notice of Arbitration.<sup>97</sup> Particularly, a claimant may propose the number of arbitrators if this has not been agreed to previously. *Article 3(3) (g) of the Rules* seems to have limited parties’ choice to either one or three. The default number is however three.<sup>98</sup>

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<sup>92</sup> A. Asouzu, ‘Arbitration and Judicial Powers in Nigeria’ (2001) 18(6) *Journal of International Arbitration* 617,627.

<sup>93</sup> See Section 251(1) of the 1999 Nigerian Constitution.

<sup>94</sup> (2003) 6 SCM 189.

<sup>95</sup> Nigerian Arbitration Rules, article 3(3) (4).

<sup>96</sup> *ibid*.

<sup>97</sup> *ibid* article 3(4).

<sup>98</sup> Arbitration and Conciliation Act, section 6; See also Article 5 of the Arbitration Rules.

Both the Arbitration Act and Rules make a distinction between the process of constituting a sole arbitration tribunal and a three-person arbitration tribunal. In appointing a sole arbitrator, either party may propose to the other party, the name of one or more persons, for agreement or counter proposal.<sup>99</sup> However, if parties have not been able to reach an agreement, the court assumes jurisdiction and makes the appointment on parties' behalf,<sup>100</sup> having regard "to such considerations as are likely to secure the appointment of an independent and impartial arbitrator..."<sup>101</sup> If on the other hand, parties opt for a three (3) person tribunal (or if the default position kicks in), each party is expected to appoint one arbitrator and the two arbitrators are then expected to appoint a third who subsequently presides over the proceedings.<sup>102</sup> If thirty days after the appointment of the first arbitrator, the other party fails to appoint his arbitrator or if thirty days after the appointment of the second arbitrator, the two arbitrators fail to appoint the third arbitrator, parties are allowed to apply to the court to make the necessary appointments.<sup>103</sup> This position was reiterated in *Royal Exchange Assurance v Bentworth Finance (Nig) Ltd*,<sup>104</sup> when the court held that it had the full power and jurisdiction to appoint an arbitrator on an application properly made by a party, where the other party had been given due notice to act and had been made aware of the existence of the present application. The Supreme Court had rightly held in *Kano State Oil & Allied Products Ltd v. Kofa*<sup>105</sup> that to be entitled to the appointment by the court of an arbitrator, the party applying must be a party to the submission, that is, he must be a party to the contract providing for arbitration.

An arbitrator's jurisdiction stems from the parties' agreement<sup>106</sup> and like many other jurisdictions, a validly constituted arbitration tribunal assumes jurisdiction over parties, their dispute and anything arising from the dispute.<sup>107</sup> In other words, an

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<sup>99</sup> Arbitration Rules, article 6(1).

<sup>100</sup> Arbitration and Conciliation Act, section 7(2)(b); See also Arbitration Rules, article 6(3).

<sup>101</sup> Arbitration Rules, article 6 (4).

<sup>102</sup> Arbitration and Conciliation Act, section 6(2)(a); Arbitration Rules, article 6.

<sup>103</sup> Arbitration Rules, article 7(2) (3); See also Arbitration Act, section 7 (2)(ii).

<sup>104</sup> (1976) 2 SC 96.

<sup>105</sup> (1995-1996) All NLR 415.

<sup>106</sup> Paul Idornigie, 'The Relationship Between Arbitral and Court Proceedings in Nigeria' (2002) 19(5) *Journal of International Arbitration* 443.

<sup>107</sup> B.A Bukar (n 7) 50.

arbitral tribunal is competent to rule on questions pertaining to its own jurisdiction and on any objection with respect to the existence or validity of an arbitration agreement.<sup>108</sup> In *Nigerian National Petroleum Corporation v Lutin Investments Ltd & Anor*,<sup>109</sup> it was held that the tribunal has the jurisdiction to decide only what has been submitted to it by the parties for determination. If it decides something beyond this, it will be acting outside its authority. Even if the tribunal in good faith misconstrues the provisions giving it power to act and therefore fails to deal with questions remitted to it but decides some questions which were not remitted to it, its decision in the arbitration proceeding will be a nullity.<sup>110</sup>

### 3.4 The Arbitral Proceedings

There are two recurring themes under our discussion on this sub head. The first is that domestic arbitration proceedings in Nigeria are mandatorily governed by the Nigerian Arbitration Rules (the Rules).<sup>111</sup> Secondly, we see the Act leaving a lot of decision making and discretion to the arbitration tribunal. It would seem as if the position and functions of the arbitration tribunal were to a large extent modelled after that of a court.

Where the Rules make “no provision in respect of any matter related to or connected to any particular arbitral proceedings, the arbitral tribunal may subject to this Act, conduct the arbitral proceedings in such a manner as it considers appropriate so as to ensure a fair hearing.”<sup>112</sup> This in other words means that parties have little or no discretion or say in the administration of their arbitration proceedings. Interestingly, parties to an international arbitration are not under this same restriction, as the Act gives them the autonomy to choose between the Nigerian Arbitration Rules, UNCITRAL Arbitration Rules or any other international Rule acceptable to them.<sup>113</sup>

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<sup>108</sup> Arbitration and Conciliation Act, section 12(1); Nigerian Arbitration Rules, article 21.

<sup>109</sup> (2006) 1 SCNJ 131.

<sup>110</sup> *K.S.U.D.B v. Fanz Construction Co Ltd* (1990) 6 SC 103.

<sup>111</sup> Arbitration and Conciliation Act, section 15(1).

<sup>112</sup> Arbitration and Conciliation Act, section 15(2).

<sup>113</sup> *ibid* section 53.

The arbitration tribunal also determines the place<sup>114</sup> and language of arbitration except where parties have a prior agreement.<sup>115</sup> If parties were able to decide the place of arbitration, the arbitral tribunal determines the locale of the arbitration within the place agreed upon by the parties. It may hear witnesses and hold meetings at any place it deems appropriate having regard to the circumstances of the arbitration.<sup>116</sup> The tribunal may also meet at any place it deems appropriate, for the inspection of goods, properties or documents relevant to the arbitration.<sup>117</sup>

The tribunal is to administer the proceedings with due regard to the principles of fair hearing. The Arbitration Act mandates every arbitral tribunal to ensure that parties are accorded equal treatment and that each party is given full opportunity to present his case.<sup>118</sup> *Article 15 of the Rules* also provides that "...the arbitration tribunal may conduct the arbitration in such manner as it considers appropriate, provided that the parties are treated with equality and that at any stage of the proceedings, each party is given a full opportunity of presenting his case".

The claimant is allowed to include his statement of claim in his Notice of Arbitration.<sup>119</sup> The Claimant may however submit (to each of the parties and the arbitrator) a separate statement of claim within a time frame to be determined by the arbitration tribunal.<sup>120</sup> The Respondent is allowed to respond via a statement of defence within a time frame, which again will be determined by the arbitration tribunal.<sup>121</sup> The arbitral tribunal also decides if and what other written statements are required for the proper administration of the matter and again determines the time frame for the submission of these documents.<sup>122</sup>

It would seem as if *Article 23 of the Arbitration Rules* in one breath curtails the seemingly unlimited powers of the tribunal to prescribe a time frame for parties, and in another

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<sup>114</sup> Arbitration Rules, article 16.

<sup>115</sup> *ibid* article 17.

<sup>116</sup> *ibid* article 16(2).

<sup>117</sup> *ibid* article 16(3).

<sup>118</sup> Arbitration and Conciliation Act, section 14.

<sup>119</sup> Arbitration Rules, article 3(4).

<sup>120</sup> *ibid* article 18(1) (2).

<sup>121</sup> *ibid* article 19.

<sup>122</sup> *ibid* article 22.

gives the same power back to the tribunal without any form of restriction. *Article 23 of the Rules* provides that “the periods of time fixed by the arbitral tribunal for the communication of written statements (including the statement of claim and statement of defence) should not exceed forty-five days. However, the tribunal may extend the time limits if it concludes that extension is justified” (emphasis added). Notwithstanding the initial parts of *Article 23 of the Arbitration Rules* therefore, the tribunal is still able to prescribe whatever time frame it deems fit based on subjective considerations.

The arbitral tribunal is also empowered to issue interim orders which it considers necessary to preserve the subject matter of the dispute.<sup>123</sup> Since the Act mandates the tribunal to decide the dispute in accordance with trade usages,<sup>124</sup> the Rules allow the tribunal to appoint one or more experts to report to it on specific issues.

Upon the conclusion of the proceedings, the tribunal may declare the hearing closed and then adjourn for the delivery of the award. The tribunal is however empowered to reopen the hearing at any time before the award is made if it deems it fit.<sup>125</sup>

### **3.5 The Decision of the Tribunal: the Award**

The end result of an arbitration proceeding is a final and binding award. The court has held in *Ras Pal Gazi v FCDA*<sup>126</sup> that once an issue has been decided upon by a validly constituted arbitration tribunal, the parties cannot be allowed thereafter to reopen it. The reason is that like a judgement of the court, the point so decided via arbitration is *res judicata* between the parties. The Nigerian Supreme Court reiterated in another case<sup>127</sup> that in a situation in which disputes or matters in difference between two or more parties, are by consent of the disputants submitted to a domestic forum, inclusive of arbitrators or a body of persons who may be invested with judicial authority to hear and determine such disputes and matters in accordance with customary law, and a decision is duly given, it is conclusive and unimpeachable.

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<sup>123</sup> *ibid* article 26.

<sup>124</sup> Arbitration and Conciliation Act, section 23(4).

<sup>125</sup> Arbitration Rules, article 29.

<sup>126</sup> (2001) 7 SCM 195.

<sup>127</sup> *Onwu v Nka* (1996) 7 SCNJ 240.

Furthermore, in *Commerce Assurance Limited v. Alli*,<sup>128</sup> the court also held that a person who duly submitted to arbitration cannot return to the court to ask it to review an award because it is unfavourable. In *Chief Benjamin Alibo & ors v Chief Benjamin Okusin & ors*,<sup>129</sup> the court held that once both parties can be proven to have agreed to be bound by the decision of the arbitrators, “the resilience of any of the parties after the verdict would be immaterial as the decision will properly be treated as constituting an estoppel per rem judicatam provided of course that the submission to the body was voluntary”. An award arising from a voluntary submission to arbitration, therefore operates between the parties as a final and conclusive decision on the matter(s) referred. This as we will come to see is subject to exceptions. A valid award in Nigeria can be a product of either of two different processes: it can be a decision reached by at least a majority of the arbitration tribunal<sup>130</sup> or a consent agreement submitted to the arbitral tribunal for ratification.<sup>131</sup> The arbitral tribunal however has the option to refuse to ratify this consent agreement reached by parties.

An award must not only be in writing, it must also be signed by the arbitrator(s).<sup>132</sup> Where the arbitral tribunal consists of more than one arbitrator, the signature of a majority shall suffice if the reason(s) for the absence of a signature is stated.<sup>133</sup> It is important to emphasize that the Act mandates the tribunal to decide the dispute in accordance with the terms of the contract as well as the trade usages of the relevant transaction.<sup>134</sup> Upon the issuance of an award, the tribunal becomes *functus officio*.<sup>135</sup> In other words, the tribunal ceases to be seised of the matter.

Parties to a faulty arbitration award are however not without any form of remedy. In *Igwego v Ezeugo*,<sup>136</sup> the court held that while the courts will give effect to decisions of arbitrators, this is not the same as saying that the parties are stopped per rem

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<sup>128</sup> (1992) 4 SCNJ 145.

<sup>129</sup> (2010) 3-5 SC (Pt 1) 41.

<sup>130</sup> Arbitration and Conciliation Act, section 24 ; Arbitration Rules, article 31.

<sup>131</sup> Arbitration and Conciliation Act, section 25(1).

<sup>132</sup> *ibid* section 26 (1).

<sup>133</sup> *ibid* section 26 (2).

<sup>134</sup> *ibid* section 23(4).

<sup>135</sup> *ibid* section 27 (1) (3).

<sup>136</sup> (1992) 7 SCNJ 284.

judicatum from contending to the contrary. The court has however held that to be able to challenge an award, the error must appear on the surface of the award itself.<sup>137</sup>

The Act seems to make a distinction between superficial and fundamental irregularities. *Section 28(1) (a) of the Act* allows a party to bring an application requesting the tribunal “to correct in the award any errors in computation, any clerical or typographical errors or any errors of a similar nature”.<sup>138</sup> This application for any of these superficial variations is entertained and handled by the arbitration tribunal and must be made within thirty days of the receipt of the award.

For the more fundamental applications, the Act allows a party who either believes (and is able to furnish proof) that the award contains decisions on matters which are beyond the scope of the arbitration,<sup>139</sup> or believes that the arbitrator has misconducted himself or that the award has been improperly procured,<sup>140</sup> to approach the court seeking that the court sets aside the award. For example, in *K.S.U.D.B v Fanz Construction Co Ltd*, the court held that if the arbitrator even in perfect good faith misconstrued the provisions giving it power to act and thereby failed to deal with the questions remitted to it but decided some question which were not remitted to it, the arbitrator's decision in the arbitration proceeding will be a nullity. This decision implies that the arbitrator's award in its entirety, was based on issues that were not submitted to the tribunal. It can therefore be implied that the invalidity of any award, will be to the extent of its inconsistency with the issues submitted for consideration. The Nigerian Arbitration Act also allows the court to separate a fundamentally defective part of an arbitration award from the rest of the award.<sup>141</sup> This is to prevent the proverbial “child from being thrown away with the bath water”.

In *Nigerian National Petroleum Corporation v. Lutin*,<sup>142</sup> the court held that an award will be set aside if it has been improperly procured or where the arbitrator misconducts himself. In describing what amounts to misconduct on the part of the arbitrator, the

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<sup>137</sup> *The United Insurance Co Ltd v Leandro Stucco* (1973) 3 SC.

<sup>138</sup> Arbitration Rules, article 36(1).

<sup>139</sup> Arbitration and Conciliation Act, section 29(2).

<sup>140</sup> *ibid*, section 30(1).

<sup>141</sup> *ibid*, section 29(2).

<sup>142</sup> (2006) 1 SCNJ 131.

court in *Taylor Woodrow of Nigeria Limited v. Suddeutsche Etna-Werk GmbH*,<sup>143</sup> held that it is misconduct on the part of the arbitrator where there is an error of law which appears on the face of the award on a point not specifically referred to the arbitration for decision. Because of the fundamental nature of these second type of applications, the Act allows parties to bring same within three months of the date of the award.<sup>144</sup>

A party who opposes an award especially on a fundamental issue also has a third but unorthodox way of challenging an award. The award debtor can simply refuse to abide by the award. The award creditor will of course be forced to approach the court to seek for the backing of the State. At this point, the award debtor may then oppose the application based on *Section 32 of the Act*, which allows any of the parties to request the court to refuse recognition and enforcement of the award.

The danger in this suggestion however lies in the statutory three months limitation period.<sup>145</sup> An award creditor who anticipates that the award debtor will refuse to abide by the award may decide to wait until after the three months limitation period, after which he will then apply to the court for an enforcement order.<sup>146</sup> At this point, the award debtor loses his right to challenge the award as the court has held in *Ras Pal Gazi v. FCDA*<sup>147</sup> that once an award has been made and not challenged in court, it should be entered as a judgement and given effect accordingly. Also in *Commerce Assurance Limited v Alli*,<sup>148</sup> the court held that “when a person affected by an arbitration award wishes to have it set aside, he must apply timeously...”

### 3.6 Enforcement of the Award

The end result of an arbitration proceeding is not just an award but a binding and enforceable award. Amazu Asouzu noted that an arbitration agreement or award without an effective enforcement mechanism is in practice very useless.<sup>149</sup> It is the usual expectation that parties abide by the decision of their selected arbitrator. The

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<sup>143</sup> (1993) 4 SCNJ 32.

<sup>144</sup> Arbitration and Conciliation Act, section 29(1).

<sup>145</sup> Arbitration and Conciliation Act, section 29(1).

<sup>146</sup> We discuss this issue in more detail in the next subsection.

<sup>147</sup> (2001) 7 SCM 195.

<sup>148</sup> (1992) 4 SCNJ 145.

<sup>149</sup> Amazu A. Asouzu, ‘The Adoption of the UNCITRAL Model Law in Nigeria: Implications on the Recognition and Enforcement of Arbitral Awards’ (1999) *Journal of Business Law* 185, 186.



question that remains unanswered is what remedies are available to an award creditor if the award debtor refuses to voluntarily abide by the decision of the arbitration tribunal.

According to the Nigerian Supreme Court in *Commerce Assurance Limited v. Alli*,<sup>150</sup> there are two different methods of enforcing an arbitration award, namely:

1. by application directly to enforce the award; or
2. by application to enter judgement in terms of the award and to enforce the judgement by one or more of the usual forms of execution.

These alternative methods of enforcing an award are fundamentally different. The first of the aforementioned methods, which the courts have referred to as a summary method, treats the award as an existing judgement so that the award creditor is only seeking to enforce the award. In other words, the court more or less recognizes and accepts the validity of the decision and enforces it as if it was a decision of the court.

The other method, which the courts have referred to as enforcement by action, refers to a process where the award creditor seeks to first obtain a judgement on the terms of the award.<sup>151</sup> Unlike the summary method which the courts recognise and treat like a valid decision, recognition of the award is not automatic under the second method. Instead, the applicant may need to go through the process of proving the contents of the award to the court.

There are three possible ways this method can be used. The first concerns the customary arbitration process and award, which we discussed in detail in Chapter Five. As we pointed out in that discussion, a customary arbitration award is not enforced summarily as parties more or less have to prove the contents and basis of the customary arbitration award. The second possible instance arises when the court is suspicious of the award. The Supreme Court has held that where there is doubt and it becomes unwise to enforce the award summarily, the court simply strikes out the application to enforce the award summarily, leaving the applicant free to commence

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<sup>150</sup> *ibid.*

<sup>151</sup> *ibid.*

an action.<sup>152</sup> Interestingly, the court is silent on how a doubtful judgement is identified. This is open to abuse as a court is able to circumvent the original process and idea behind the party's choice of arbitration by arguing that the award is doubtful. If this method is to be retained however, the Act ought to stipulate guidelines on when and how this method may be used by the court. The third and final scenario refers to a situation in which an award creditor seeks for the extra protection of his rights by converting his award to a judgement of the court before going ahead to seek for enforcement. This method is similar to the process in which parties convert their agreement into a consent judgement of the court.

Of the two methods of enforcement enunciated in *Commerce Assurance Limited v. Alli*, the Act only recognizes the summary method. *Section 31 of the Act* mandates the court to enforce an award upon an application in writing.<sup>153</sup> Obviously, an application in writing is not as serious as the action contemplated in *Commerce Assurance Limited v. Alli*. In addition to a written application, the award creditor is also expected to supply the court with a duly authenticated original award (or a duly certified copy) as well as a copy of the original arbitration agreement (or a duly certified copy).<sup>154</sup> Professor Paul Idornigie rightly points out that because arbitration proceedings are not the same as negotiations or out of court settlements, courts have no jurisdiction to award interest on an arbitral award or to otherwise interfere with the award.<sup>155</sup>

Finally, unlike what Professor Andrew Okekeifere<sup>156</sup> suggests, there is clearly a time limit for the enforcement of awards. According to the Supreme Court in *City Engineering Nigeria Ltd v Federal Housing Authority*,<sup>157</sup> an application to enforce an award expires six year after the cause of action arises. The court further held that "...the clause to stay access to the court commonly referred to as Scott v Avery Clause defers the application of statute of limitation to the date of arbitral award. In the

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<sup>152</sup> *Commerce Assurance Limited v Alli* (1992) 4 SCNJ 145.

<sup>153</sup> Arbitration and Conciliation Act, section 21(1).

<sup>154</sup> *ibid* section 31(2).

<sup>155</sup> Paul Idornigie, 'Nigeria: Making An Arbitral Award a Judgement of the Court' (2002) 15(2) *International Arbitration Law Review* 39, 40.

<sup>156</sup> Andrew Okekeifere, 'The Enforcement and Challenge of Foreign Arbitral Awards in Nigeria' (1997) 14(3) *Journal of International Arbitration* 223 231.

<sup>157</sup> (1997-1998) All NLR 1.

absence of such a clause, time starts to run for the purpose of limitation statute, from the date of the breach of contract". In other words, the position under Nigerian law is that the time limitation for the enforcement of an award begins the day the cause of action arises and not from the date the implied promise to abide by the award is breached.<sup>158</sup>

The learned Silk, Olawale Akoni rightly points out that the aforementioned position is likely to engender injustice. Using the limitation rule in Lagos State for example, he opines that it is not out of place to foresee a situation where the six-year limitation period has expired even before an award has been delivered.<sup>159</sup> This position is susceptible to abuse as a mischievous party may decide to delay proceedings in order to ensure the exhaustion of the limitation period. It completely defeats the purpose of arbitration where despite a successfully concluded arbitration, an award creditor is unable to enjoy the benefits of his award due to legal technicalities.

## **4.0 PREVIOUS ATTEMPTS AT REFORM**

### **4.1 The 2005 Reform Committee**

In September 2005, the then Honourable Attorney General of the Federation, Chief Bayo Ojo FCI Arb, put together a fifteen (15) man committee to review Nigeria's arbitration and ADR laws. This Committee, which was known as the National Committee on the Reform and Harmonization of Arbitration and ADR Laws in Nigeria ("the Committee") was under the chairmanship of the late Hon. Justice Dr Olakunle Orojo FCI Arb. According to Dr Gbenga Bamodu, the Committee was set up in response to concerns that the Arbitration and Conciliation Act had not only

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<sup>158</sup> This also used to be the situation in England until the decision of the English court in *Agromet Motoimport Ltd v Maulden Engineering (Beds) Ltd* (1985) 1 W.L.R 762.

<sup>159</sup> Olawale Akoni, 'Limitation Period For the Enforcement of Arbitration Awards in Nigeria: City Engineering Nigeria Ltd v Federal Housing Authority' [www.ciarbnigeria.org/media/documents/Review\\_of\\_City\\_Engineering\\_Case%5B1%5D.pdf](http://www.ciarbnigeria.org/media/documents/Review_of_City_Engineering_Case%5B1%5D.pdf) accessed 21 December 2015.

become outdated but also that the Act was being invoked and occasionally applied in a manner which undermined arbitration agreements and proceedings.<sup>160</sup>

Unfortunately, like many other committees set up by the Federal Government of Nigeria, this Committees' report seems to have been discarded as it is yet to be implemented almost ten years after it was submitted.<sup>161</sup>

Before discussing relevant aspects of the said report, it is necessary to make general comments about it. First is that while the Committees' terms of reference encapsulated both arbitration and other ADR laws,<sup>162</sup> the Committee seemed to be fixated on international arbitration and the UNCITRAL Model Law.<sup>163</sup> In addition, the Committee like many other Nigerian writers, seemed to view and approach arbitration as a commercial dispute resolution mechanism, whereas the practice carries within it more potential than is attributed to it.<sup>164</sup>

Rather than recommending a practical and viable arbitration practice that is able to cater for both international and domestic arbitration, the Committee suggested the generic international arbitration framework as prescribed by the UNCITRAL Model Law, for the domestic arbitration practice of a developing country like Nigeria.<sup>165</sup> According to the Committee, after careful consideration, it was of the firm view that the law and procedure relevant to a domestic arbitration is substantially the same as that of international and interstate arbitration.<sup>166</sup>

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<sup>160</sup> Gbenga Bamodu, 'Legislative Competence Over Arbitration In Nigeria: Towards Resolving the Constitutional Controversy' (2016) 19(1) International Arbitration Law Review 1,3.

<sup>161</sup> This is a usual occurrence in Nigeria. Another prominent example is the Petroleum Industry Bill, which has been pending for almost five years. Many times, these reports usually get caught up in political imbroglios.

<sup>162</sup> Report prepared by the National Committee on the Reform and Harmonization of Arbitration and ADR Laws in Nigeria 7 <[www.aluko-oyebode.com/\\_uploads/publications/amended%20report.pdf](http://www.aluko-oyebode.com/_uploads/publications/amended%20report.pdf)> accessed 15 December 2014.

<sup>163</sup> *ibid* 4.

<sup>164</sup> There is a recent rise in the practice of family arbitration in the United Kingdom. See Nigel Shepherd, 'Top Judge Gives Green Light to Family Arbitration' (2014) 1 Private Client Business Journal 65.

<sup>165</sup> We have mentioned severally that the Model Law was suggested as an international commercial arbitration model. See Article 1(1) of the Model Law; James O'Rodner, 'International and National Arbitration: A Fading Distinction' (2002) 19(5) Journal of International Arbitration 491,492.

<sup>166</sup> Reform Committee Report (n 162) 62.

This aforementioned position is arguably not true. There is clearly a reason why countries like Hong Kong, Scotland and the Canadian Provinces (apart from Quebec) amongst others, have chosen to adopt the UNCITRAL Model Law for their international arbitration practice alone,<sup>167</sup> while prescribing another framework for their domestic arbitration practice.<sup>168</sup> This is not only because the UNCITRAL Law is more of an international arbitration law,<sup>169</sup> international and domestic arbitration clearly have different considerations.<sup>170</sup> For instance, an international arbitration will not only and most probably involve a multiplicity of laws, the amount in dispute as well as the cost involved in an international arbitration will also in most instances be higher than in a domestic arbitration proceeding. Furthermore, the need for specialist knowledge and expertise is more probable in international arbitration than in domestic arbitration. Thus, for example it may be more efficient to appoint a three-person panel in an international arbitration and not a domestic proceeding.

Moreover, the committee seemed to model its proposed bill after the UNCITRAL Model Law.<sup>171</sup> While this is not in itself a bad approach, the arbitration experiences in countries like the United Kingdom and Ghana<sup>172</sup> have shown that adopting the Model Law hook, line and sinker is generally not the best approach. At best, there is the need to adapt the Model Law to suit the individual idiosyncrasies of each nation. For example, in Chapter Six, we highlight the extensive consultation undertaken by the Departmental Advisory Committee in England before arriving at its draft bill.<sup>173</sup>

Furthermore, as we have seen in Chapter Two of this thesis, ADR has strong roots in Nigeria and was in fact the means of resolving disputes before the introduction of the English-styled (or formal) court system in Nigeria. It is therefore ironic that in preparing a proposal for the reform of arbitration and ADR in Nigeria, none of these

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<sup>167</sup> James O’Rodner (n 165) 491,492; See also UNCITRAL Model Law, article 1(1).

<sup>168</sup> R.H. Christies, ‘Arbitration: Party Autonomy or Curial Intervention III: Domestic Arbitration’ (1994) III African Law Journal 552.

<sup>169</sup> See Article 1(1) of the UNCITRAL Model Law.

<sup>170</sup> Kenneth Glasner, QC, ‘A lawyer’s Primer in Drafting Arbitration Clauses For a Domestic Arbitration’ (2010) 68(6) Advocate Vancouver 869, 870.

<sup>171</sup> *ibid* 4, 8.

<sup>172</sup> We discuss the Ghanaian and English experience in Section 1.0 and 3.0 of Chapter Six.

<sup>173</sup> See Section 3.1 of Chapter Six.

pre-existing methods were considered by the Committee. As we will see in subsequent chapters, Ghana having realized the usefulness of customary arbitration, especially in the administration of justice among the middle and lower strata of the society, has incorporated its customary arbitration practice into its newly enacted ADR Act 2010.<sup>174</sup> Unfortunately, it would seem as if the Committee failed to see that the significance and usefulness of arbitration extends beyond its relevance to international trade and commercial activities. It is the position of this writer that arbitration when properly designed is able to mitigate the crisis in the judiciary.<sup>175</sup>

Upon the conclusion of its mandate, the Committee came up with two draft laws: The Federal Arbitration and Conciliation Act ("FACA") and the Uniform State Arbitration and Conciliation Law ("USAC").<sup>176</sup> While the purview of the FACA is limited to international and inter-state arbitration, the USAC was put in place to administer domestic arbitration. In terms of substance, both laws are about the same.<sup>177</sup>

The application of the USAC and the extent to which it will apply is left to the discretion of each individual State. Till date, only Lagos State has adopted a revised USAC in the form of the Lagos State Arbitration Law 2009.<sup>178</sup>

#### **4.2 The Uniform State Arbitration Law: The Lagos State Arbitration Law 2009 in View.**

The Lagos State Arbitration Law 2009 ("LSAL") was introduced on 18 March 2009, to administer domestic arbitrations arising in Lagos.<sup>179</sup> *Section 1(a) (b) of the LSAL*, which is closely modelled after the English Act<sup>180</sup> clearly states the objectives of the Act.<sup>181</sup> *Section 1(c) (d) of the LSAL* emphasises that an arbitration agreement is binding except parties decide otherwise. This is an improvement on the Nigerian Arbitration Act,

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<sup>174</sup> We examine this in more detail in Section 1.1.3 of Chapter Six.

<sup>175</sup> The Honourable Minister must share in the blame for setting up a team made up of commercial lawyers and arbitrators to prepare a report that was intended to extend beyond commercial arbitration.

<sup>176</sup> In subsequent parts of this chapter, we examine how the Federal and State arbitration laws operate as against each other in reality.

<sup>177</sup> The exceptions relate to the New York Convention 1958 as well as the enforcement of international arbitration.

<sup>178</sup> There are however questions as to its constitutionality as it seeks to administer both international and domestic arbitration seated in Lagos. We deal with this constitutional law issue further in this thesis. See Section 5.3 of this chapter.

<sup>179</sup> There are questions as to the application of the Law in international arbitrations seated in Lagos.

<sup>180</sup> Section 1(a) (b) of the English Arbitration Act 1996.

<sup>181</sup> See also Clause 2 of the Proposed Bill.

which like we have seen, gives the court the unrestricted power to revoke an arbitration agreement.<sup>182</sup> Interestingly, the Committee in its report and without reason chose to retain this *Section 2 of the Nigerian Arbitration Act*.<sup>183</sup>

In many ways, the USAC and LSAL are similar to the Nigerian Arbitration Act.<sup>184</sup> The USAC and by extension the LSAL however differ and arguably build on some of the perceived weaknesses of the Nigeria Arbitration Act. For example, while the Nigerian Act insists on a written and signed agreement, the LSAL borrowing a leaf from the USAC<sup>185</sup> incorporates Option one of the revised version of the Model Law by omitting the signature requirement and also by adopting a more flexible definition of writing.<sup>186</sup> We however argue further in this chapter that for arbitration to be a useful method of resolving domestic disputes in Nigeria, Option two of the revised Model Law (as against Option one) ought to be the default method.<sup>187</sup>

Under our discussion on stay of proceedings in favour of an arbitration agreement, we mentioned that with regards to domestic arbitration, the Nigerian Arbitration and Conciliation Act bestows the court with the discretion to decide whether to grant such an application.<sup>188</sup> The LSAL however strips the court of this discretion.<sup>189</sup> Furthermore, as against the Nigerian Arbitration Act which provides for three arbitrators,<sup>190</sup> the LSAL provides for only one arbitrator as a default provision, thus encouraging a cheaper arbitration process.<sup>191</sup> Onyeama rightly lauds this new provision as it takes into consideration the needs of small and medium sized business organizations.<sup>192</sup>

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<sup>182</sup> Section 2 of the Nigerian Arbitration Act.

<sup>183</sup> See Reform Committee Report (n 162) 16.

<sup>184</sup> *ibid* 16; The affected sections include Section 2, 3, 11, 17, 18, 20, 21, 25, 27, 28, 35, 36 of the Nigerian Arbitration and Conciliation Act, amongst others.

<sup>185</sup> Clause 2 of the proposed USAC.

<sup>186</sup> Lagos State Arbitration Law 2009, section 3(3)(4)(5).

<sup>187</sup> We examine the revised version of the Model Law further in this thesis. See Section 5.1 of this chapter and Section 2.3 of Chapter Six.

<sup>188</sup> Nigerian Arbitration and Conciliation Act, section 5.

<sup>189</sup> Lagos State Arbitration Law 2009, section 6.

<sup>190</sup> Nigerian Arbitration and Conciliation Act, section 6.

<sup>191</sup> See Clause 6 of the proposed USAC.

<sup>192</sup> Emilia Onyema, 'A Critique of the New 2009 Arbitration Law of Lagos State' (2010) 2(5) *Apogee Journal of Business, Property and Constitutional Law* 1, 5.

This writer disagrees with *Section 36 of the LSAL*, which provides that in the absence of parties' agreement, the arbitration proceedings shall be conducted in English. This is unlike *Section 18(1) of the Nigerian Arbitration Act*, which provides that in the absence of parties' choice of language, the tribunal is to determine the language(s) to be used in the hearing, bearing in mind all relevant circumstances.

While English language may very well be a common denominator between parties, other considerations exist which may make another language more suitable for the domestic proceedings. For example, we have in a previous chapter submitted that Nigeria is made up of almost 500 different tribes and cultures. Furthermore, as we will see later in this chapter, a substantial percentage of Nigerians remains uneducated. As we have also seen, the Nigerian law also recognises oral contracts, many of which are conducted in local dialects. All these being said, rather than foist a particular language on parties, this writer submits that the issue of language especially in regards to domestic arbitration proceedings ought to be decided on a case by case basis as provided by the Nigerian Arbitration Act.

In addition, unlike the Nigerian Arbitration Act which mandatorily prescribes the Nigerian Arbitration Rules as the applicable procedural rule, the LSAL allows parties to opt out of the Lagos Arbitration rules.<sup>193</sup> This obviously supports parties' autonomy to decide critical aspects of their arbitration.

The LSAL also pioneers certain provisions, many of which were borrowed from the English Act.<sup>194</sup> For example, the LSAL allows parties to agree to consolidate their proceedings with existing but similar proceedings.<sup>195</sup> Third parties to a proceeding are also allowed to make an application to join the proceedings, with the permission of the parties. Parties' approval of this application preserves the contractual nature of an arbitration since on a question of privity, the parties to the arbitration agreement need to give their consent to any consolidation or joinder request.<sup>196</sup>

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<sup>193</sup> Lagos State Arbitration Law, section 31.

<sup>194</sup> We examine some of these innovations in more detail during our discussion on the English Arbitration Act 1996 in Section 3.2 of Chapter Six.

<sup>195</sup> Lagos State Arbitration Law, section 40.

<sup>196</sup> Emilia Onyema (n 192) 21.



*Section 9 of the LSAL* also introduces the position of an umpire.<sup>197</sup> Parties have the autonomy to stipulate the powers of this umpire, failure in which the law lays down the functions of the umpires. *Section 18 of the LSAL* also confers an arbitrator, his employee or agents with immunity from any act done or omitted in the discharge of his functions, subject to any act or omission done in bad faith. The LSAL guarantees the payment of the arbitrator fees, failure in which the arbitrator has a lien on the award for unpaid fees.<sup>198</sup> *Section 51(2) of the LSAL* however provides that the arbitrators' fees shall be reasonable and should take into consideration relevant circumstances like the amount in dispute and the complexity of the dispute.

## 5.0 A CASE FOR REFORMS

The twenty-six-year-old Nigerian Arbitration and Conciliation Act is for many obvious reasons in need of urgent reform.<sup>199</sup> The need for reforms is based on other factors apart from the typographical mistakes which litter the Act.<sup>200</sup> Not only is it apparently outdated, the arbitration law and framework in its present state is clearly unsuitable for a domestic arbitration practice in a developing country like Nigeria. Dr Onyeama rightly notes that small and medium scaled businesses in Nigeria are potential but untapped arbitration markets.<sup>201</sup> Furthermore, the framework from which the Nigerian Arbitration and Conciliation Act was modelled has since been revised to reflect modern realities.<sup>202</sup> Admittedly, one may argue that the old age of the Act is not enough reason to revise a fully functionally and relevant Act, however as we will soon come to see, the Act is neither fully functional nor very relevant.

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<sup>197</sup> This is also equivalent to Section 21 of the English Arbitration Act 1996.

<sup>198</sup> Section 49(2) of the Lagos State Arbitration Law.

<sup>199</sup> Amazu Souza, 'The UN, the UNCITRAL Model Arbitration Law and the Lex Arbitri of Nigeria' (2000) 17(5) *Journal of International Arbitration* 85, 108; Adewale Olawoyin, 'Charting New Waters with Familiar Landmarks' (2009) 26(3) *Journal of International Arbitration* 373; See also Reform Committee Report (n 162) 4.

<sup>200</sup> For example, see the Preamble as well as Section 6 of the said Act; See also Paul Idornigie (n 20) 50, 55.

<sup>201</sup> Emilia Onyema, 'Effective Utilization of Arbitrators and Arbitration Institutions in Africa by Appointors' (A Paper delivered at the 4<sup>th</sup> Arbitration and ADR Workshop themed 'Empowering Africa in the 21<sup>st</sup> Century through Arbitration and ADR' Egypt 29-31 July 2008).

<sup>202</sup> In Section 2.2 of Chapter Six, we identify any relevant changes to the Model Law.

In reviewing the domestic arbitration part of the Act, reference will also be made to relevant parts of the Committee's report.

## 5.1 The Issue of Writing

*Section 1(1) (2) of the Act* provides that "every arbitration agreement shall be in writing contained...in a document signed by the parties".<sup>203</sup> As the reform Committee rightly observed, this mandatory writing and signing requirement is anachronistic and is not only inconsistent with a significant number of internationally accepted practices, but also with contemporary forms of business communication.<sup>204</sup> This requirement for example, automatically invalidates arbitration agreements contained in specialized types of contract like bills of lading, companies' article of association and negotiable instruments, among many others.<sup>205</sup> This is because these agreements meet the writing but not the signing requirement. As Professor Paul Idornigie rightly noted, it is difficult to reconcile this writing requirement with the prevalence of electronic commerce.<sup>206</sup> The Committee after considering the flexible definition of writing adopted in a country like the United Kingdom as well as the provision in the new Model Law, chose to remove the signature requirement and adopt a loose definition of writing.<sup>207</sup>

The question which this Committee however failed to avert its mind to, is whether a domestic arbitration agreement should mandatorily be in writing or whether the Nigerian Arbitration and Conciliation Act should be revised to adopt an approach that also accommodates oral agreements.

As mentioned in the introductory parts of this chapter, the Committee was so fixated on international arbitration and sophisticated business practices that it failed to consider the existing situation in Nigeria. No doubt, many modern business agreements (and arbitration agreements) are written. However, there still remains a

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<sup>203</sup> This provision is based on Article 7 of the old Model Law.

<sup>204</sup> The Model Law has since revised this aspect of the old Model Law to incorporate the trend.

<sup>205</sup> Reform Committees Report (n 162) 18-19.

<sup>206</sup> Paul Idornigie (n 20) 57.

<sup>207</sup> *ibid* 20-22.

large number of business contracts and relationships which are concluded orally, mainly because of the level of education in Nigeria.

The United Nations Children Fund (“UNICEF”) reports that “forty percent of Nigerian Children aged 6-11 do not attend any primary school...Despite a significant increase in net enrolment rates in recent years, it is estimated that about 4.7 million children of primary school age are still not in school...Increased enrolment rates have created challenges in ensuring quality education and satisfactory learning achievements as resources are spread more thinly across a growing number of students. It is not rare to see cases of 100 pupils per teacher...”<sup>208</sup> According to the Guardian Newspaper, Nigeria has the highest number of children out of school in the whole world. In fact it has been reported that out of the over fifty seven million children who are out of school worldwide, Nigerian children account for over ten million of that number.<sup>209</sup> In recognition of this problem, international developmental agencies like the World Bank have devoted huge sums of money all in an effort to tackle this issue.<sup>210</sup>

This high number of uneducated Nigerian children, which is said to be an improvement over previous figures, is an indication of the number of uneducated adults currently in Nigeria. It is therefore difficult to understand the inclusion and continued retention of the mandatory writing requirement in the Act. The literacy situation in Nigeria clearly does not support this position of the law. By doing this, Nigeria is precluding the regular Nigerian business person who may not be able to read and write from exercising his power of choice and by extension, from enjoying the advantages associated with domestic arbitration. Illiterate Nigerians, indeed local

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<sup>208</sup>UNICEF (Nigeria) <[www.unicef.org/nigeria/children\\_1937.html](http://www.unicef.org/nigeria/children_1937.html)> accessed 17 December 2014

<sup>209</sup>David Archer, ‘Nigeria's girls and the struggle for an education in the line of fire’ *The Guardian* (15 May 2014) <[www.theguardian.com/global-development/poverty-matters/2014/may/15/nigeria-girls-education-boko-haram](http://www.theguardian.com/global-development/poverty-matters/2014/may/15/nigeria-girls-education-boko-haram)> accessed 17 December 2014

<sup>210</sup>The World Bank, ‘World Bank to Continue Support to Nigeria for Secondary Education, Building on Solid Results in Lagos State’ *World Bank Press Release* (6 March 2014) <[www.worldbank.org/en/news/press-release/2014/03/06/world-bank-to-continue-support-to-nigeria-for-secondary-education-building-on-solid-results-in-lagos-state](http://www.worldbank.org/en/news/press-release/2014/03/06/world-bank-to-continue-support-to-nigeria-for-secondary-education-building-on-solid-results-in-lagos-state)> accessed 27 December 2014

businesses have as much right to the benefits of arbitration as their literate and international counterparts.<sup>211</sup>

Besides, Nigerian law recognises oral contracts. Every day, Nigerian businessmen enter into oral contracts and the law has in many instances expressed its willingness to enforce such contracts.<sup>212</sup> We have also seen that the Nigerian Arbitration Act recognises and validates arbitration agreements contained in contracts.<sup>213</sup> It is therefore not out of place to expect that the law should recognise oral arbitration agreements, especially if they are contained in oral contracts.<sup>214</sup>

Interestingly as we will see in Chapter Five of this thesis, Nigeria has its own deeply rooted, successful and legally recognized customary arbitration process. This judicially recognized system remains largely unwritten and therefore beyond the purview of the Arbitration Act. Instead the principles guiding this process remain regulated by case law. Allowing the successful customary arbitration practice to function within the general framework of the Act will no doubt boost the use of arbitration and this will in turn reduce the large caseload of the Nigerian courts.

Admittedly, questions may arise as to the suitability of the customary arbitration framework within a formal statutory framework like the Nigerian Arbitration Act. However, drawing from our discussion in this chapter and the preceding one, as well as the experience in Ghana (with the introduction of the Ghanaian ADR Act 2010), we will see that it is in fact possible to successfully incorporate customary arbitration into the formal arbitration framework of Nigeria. This is mainly because there is little or no difference between both practices (arbitration in the traditional sense and customary arbitration). For any difference, we argue that just as the English Arbitration Act 1996 for example, has a common framework for domestic and

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<sup>211</sup> James O’Rodner (n 165) 490

<sup>212</sup> See for example, Section 125 of the Evidence Act 2011.

<sup>213</sup> Arbitration and Conciliation Act, section 12 (2).

<sup>214</sup> Admittedly questions of proof may arise at this point but as we will see in Section 2.1.2 of Chapter Seven, Nigerian law provides a number of avenues of dealing with this kind of situation.

international arbitration but makes separate provisions where necessary,<sup>215</sup> it is in fact possible to apply the same rationale to customary and domestic arbitration.<sup>216</sup>

In order to encourage the growth and use of arbitration especially among regular Nigerians, lawmakers clearly need to reconsider its mandatory writing requirement. Local businesses and the large number of uneducated but very wealthy business men in Nigeria constitute a ready and steady market for arbitration.<sup>217</sup>

## 5.2 Court Intervention

The Act allows the court a lot of discretion to decide the validity of domestic arbitration agreements.<sup>218</sup> As the reform Committee rightly noted, the Act contains defects which permit a high degree of judicial intervention in arbitration proceedings, contrary to what is permitted by international standards.<sup>219</sup> While judicial intervention in arbitration is not necessarily antithetical to arbitration,<sup>220</sup> it is submitted that by giving the courts an unreasonable amount of discretion and power, the Act restricts the very autonomy which it was enacted to provide.

Interestingly, with regards to international arbitration, the Act more or less curtails any discretion the courts may have over international arbitration agreements. For example, in *Section 4 of the Nigerian Arbitration and Conciliation Act*,<sup>221</sup> which applies to international arbitration, the Act provides that “a court before which an action which is the subject of an arbitration is brought shall, if any party so requests not later than when submitting his first statement on the substance of the dispute, order a stay of proceedings and refer the parties to arbitration”. On the hand, in its provision for domestic arbitrations, *Section 5(1) of the same Act* allows any party to apply to the court to stay proceedings before delivering any pleadings or taking any other steps in the

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<sup>215</sup> For example, in areas relating to enforcement of awards.

<sup>216</sup> We discuss this issue in more detail in Chapter Five.

<sup>217</sup> Emilia Onyema (n 201).

<sup>218</sup> This has been referred to as the “Judicialisation of arbitration”. According to Redfern and Hunter on International Arbitration, this refers to a situation where the arbitration is subjected to judicial intervention and control. See Nigel Blackaby et al, *Redfern and Hunter on International Arbitration* (6<sup>th</sup> Edition, Oxford Press, 2015) 34.

<sup>219</sup> Reform Committee Report (n 162) 9.

<sup>220</sup> This writer expressed this view in Section 3.2 of Chapter Six.

<sup>221</sup> Chapter A18, Laws of the Federation of Nigeria 2004.

proceedings. The provision however goes on to state that “a court to which an application is made under subsection (1) of this section may, if it is satisfied a) that there is no sufficient reason why the matter should not be referred to arbitration in accordance with the arbitration agreement; and b) that the applicant was at the time when the action was commenced, was ready and still remains ready and willing to do all things necessary to the proper conduct of the arbitration, make an order staying the proceedings”.<sup>222</sup> We see the Act use the word “shall” in *Section 4*, which in general legal parlance imposes a mandatory duty on the court,<sup>223</sup> while in *Section 5* it uses the word “may”, which going by legal definition means that the court is allowed to exercise its discretion in such a situation.<sup>224</sup> The Act goes ahead to list conditions which the applicant must prove before the court will grant an order of stay of proceedings.

Of course, one may argue that the mandatory requirement in regards to international arbitration is as a result of the effect of *Article 2 of the New York Convention* which mandates every contracting State to recognize any arbitration agreement. However, it is submitted that this very principle enshrined in the New York Convention is one of the undisputed hallmarks of arbitration in general and not just international arbitration. Furthermore, it is obvious that even the Nigerian courts have moved beyond *Section 5 of the Act* and have instead shown their intention to recognise and enforce every valid arbitration agreement without limiting it to either international or domestic arbitration. For example, in *M.V. Lupex v. Nigeria Overseas Chartering & Shipping Ltd*,<sup>225</sup> the Supreme Court held that the general policy in cases where the parties have contracted to be bound by arbitration, is to hold parties to the bargain into which they have entered.<sup>226</sup> This provision has therefore lost its relevance and should be updated to reflect the present practice.

Another example of unreasonable court intervention is *Section 2 of the Act*, which provides that “unless a contrary intention is expressed therein, an arbitration

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<sup>222</sup> Section 5(2) (a) (b) of the Act.

<sup>223</sup> Black’s law Dictionary (8<sup>th</sup> Edition, 2004) 1407.

<sup>224</sup> *ibid* 1000.

<sup>225</sup> (2003) 10 SCM 71.

<sup>226</sup> We discuss the binding nature of an arbitration agreement further in this chapter.

agreement shall be irrevocable except by agreement of parties or by leave of the court or judge". The interesting thing about this section is that it gives the Judge unfettered jurisdiction to revoke an arbitration agreement. In *Section 30 of the Arbitration Act*, the courts are also empowered to set aside an award where the arbitrator has misconducted himself in the course of the proceedings. Unfortunately, the Act fails to provide guidance on what amounts to misconduct, potentially leaving this provision open to abuse by the courts. Professor Akanbi rightly notes that the Nigerian courts have tended to adopt a wide definition of misconduct.<sup>227</sup> For example, the Nigerian Supreme Court held in *Taylor Woodrow Nigeria Ltd v Suddeutsche Etna-Werk GmbH* that such matters as ambiguity amount to misconduct.<sup>228</sup> The conclusion seems to be that the average Nigerian Judge is not well versed in the principles of arbitration.<sup>229</sup>

One may argue that there are some situations where it may be necessary for the courts to void an arbitration agreement reached by the parties. For example, the court may decide to invalidate an otherwise "valid" arbitration agreement where it is obvious that there has been undue influence on one of the parties to enter into the said agreement. The problem this writer however has with an unfettered court intervention is not only that it defeats the entire idea behind arbitration and party autonomy but also because it is open to abuse by a corrupt or less knowledgeable court. Unfortunately, we have seen in Chapter Two that the Nigerian judiciary is still trailed by allegations of corruption.<sup>230</sup>

Notwithstanding the foregoing, there are still some elements of court intervention embedded in the Act that this writer deems necessary. For example, the Act provides that an arbitral tribunal shall by default have three members.<sup>231</sup> Under our discussion on the constitution of the tribunal, we have seen that the court is expected to appoint

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<sup>227</sup> Mustapha Akanbi, 'Challenges of Arbitration Practices under the Nigerian Arbitration and Conciliation Act of 1988: Some Practical Considerations' (2012) 28(4) *Arbitration* 325, 329.

<sup>228</sup> (1993) 4 *NWLR* (Pt 282) 127.

<sup>229</sup> Collins Namachanja, 'The challenges facing arbitral institutions in Africa' (2016) 82(1) *Arbitration* 44, 51; Olakunle O. Olatawura, 'Arbitration in Nigeria: From Theory to Practice' (1996) 7(9) *International Company and Commercial Law Review* 325, 328.

<sup>230</sup> See Section 3.4 of Chapter Two.

<sup>231</sup> *Arbitration and Conciliation Act*, section 6.

an arbitrator on behalf of a defaulting party. The Reform Committee in response to this provision suggested that “where a party fails to appoint his arbitrator, the other party who has appointed his own arbitrator may serve written notice on the defaulting party that he intends to constitute his arbitrator into a sole arbitrator. If within seven days of receiving such notice, the defaulting party has not appointed his arbitrator, the other party may appoint his arbitrator as sole arbitrator and the decision of such arbitrator shall be binding on both parties”.<sup>232</sup> This writer disagrees with the Committees’ conclusion and instead aligns himself with the position of the Act. Interestingly, the Committee conveniently ignored the *second half of Section 7*, which deals with a situation when it is in fact the arbitrators selected by the parties that have failed to appoint a third arbitrator.

It is submitted that in specific situations (like appointing an arbitrator), there is a need to introduce some kind of third party intervention, in order to ensure that the rights and interests of the other party are protected even if that other party is errant. This is for many reasons. For example, it is necessary to ensure that the arbitrator nominated by the claimant fits basic qualities or characteristics that parties have previously agreed to and/or the basic qualities expected of an arbitrator generally. Even an errant party should not be stripped of these contractual rights especially when the claimant seeks to still rely on the same contract. Furthermore, because the right of access to court is a constitutional issue, the process by which parties opt out of that right should not be taken lightly. There is need to ensure that the claimant has followed due process. For example, he must have taken reasonable steps to inform the intended respondent of the arbitration as well as given the said respondent the opportunity to either challenge the claim or the validity of the arbitration agreement. This not only protects the rights and interests of the respondent, it also prevents the claimant from investing a lot of time and money into a proceeding that will at the end be invalidated.

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<sup>232</sup> Reform Committee Report (n 162) 29



### 5.3 Constitutionality of Arbitration

The Nigerian Constitution distinguishes between the legislative duties of the National Assembly and that of the State House of Assembly. The National Assembly, which is the Federal legislative organ, has exclusive jurisdiction to “make laws for the peace, order and good government of the federation or any part thereof with respect to any matter included in the exclusive legislative list set out in Part 1 of the Second Schedule to this Constitution”.<sup>233</sup> The National Assembly also shares specific powers listed under the concurrent legislative list, with the State House of Assembly.<sup>234</sup> The latter however has sole jurisdiction over matters not listed under the exclusive or concurrent legislative list.<sup>235</sup> Such matters are said to be on the residuary list.

Nigeria continues to grapple with the consequences of the architecture of the 1999 Constitution, especially as regards which of the aforementioned legislative arms has competence to make laws on the subject matter of arbitration.<sup>236</sup> For example, Ikeyi and Amucheazi have argued that while the Arbitration and Conciliation Act may apply to international and interstate disputes, it cannot apply to intrastate trade and commerce as the settlement of interstate commercial disputes is not one of such matters in which the National Assembly is empowered by the Constitution to make laws.<sup>237</sup> Professor Paul Idornigie on his part argued that although the Arbitration and Conciliation Act is an existing law, arbitration is not one of the matters on which the National Assembly is exclusively empowered by the Constitution to make laws and that trade and commerce could at best be regulated by both legislative bodies.<sup>238</sup>

The reform Committee in its report conceded that by virtue of the fact that arbitration is not expressly listed on either the exclusive or concurrent legislative list, it is possible to argue that the Federal Government has no constitutional power to legislate on it as it is on the residuary legislative list. While some members of the committee advocated for a constitutional amendment, the Committee came to the conclusion that in fact, the

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<sup>233</sup> 1999 Nigeria Constitution, section 4(2).

<sup>234</sup> *ibid*, section 4(a).

<sup>235</sup> *ibid*, section 7(a).

<sup>236</sup> Adewale A. Olawoyin (n 3) 34,35.

<sup>237</sup> Ikeyi and Amucheazi, ‘Applicability of the Arbitration and Conciliation Act: Which Field Does the Act Cover’ (2013) 57(1) *Journal of African Law* 126, 133.

<sup>238</sup> Paul Idornigie (n 20) 53.

power of the Federal Government can be implied when one reads *Item 62 and 68* of the exclusive legislative list. *Item 62* empowers the National Assembly to legislate on “trade and commerce, and in particular...trade and commerce between Nigerian and other countries...and trade and commerce between the States”. *Item 68 of the said list* also empowers the National Assembly to make laws on “any matter incidental or supplementary to any matter mentioned elsewhere in this list”.

The Committee concluded that by virtue of the combined effect of *Item 62 and 68 of the list*, the Federal Government has power to legislate on arbitral matters touching on trade and commerce between Nigeria and other countries as well as on interstate issues. They argued that States have legislative power over any other matter not within the aforementioned. They suggested that the Federal Government provides a Uniform Arbitration and Conciliation Law for the States to adopt as desired.

Dr Gbenga Bamodu in a way disagreed with the Committees’ opinion as he argued that arbitration is in fact a part of and/or encompassed within trade and commerce. In other words, unlike the Committee which opined that arbitration is incidental or supplementary to trade and commerce, Dr Bamodu was of the opinion that arbitration is indeed a type of trade that involves commerce. He argued that arbitration service is a business and that it is a recognisable and potentially lucrative service sector in its own right. In his opinion, it is on this basis covered within the meaning of trade and commerce as provided for in *Item 62*.<sup>239</sup>

Dr Olawoyin also disagreed with the Committees’ conclusion but for a different reason. He made a valid point when he opined that while it is possible to argue that arbitration complements trade and commerce, it is wrong to suggest that it is in fact incidental or supplementary to trade and commerce as it is not a compulsory component of trade or commerce since the arbitration process is not necessary to the fulfilment or furtherance of trade and commerce.<sup>240</sup> He argued that something is

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<sup>239</sup> Gbenga Bamodu, ‘Legislative Competence Over Arbitration In Nigeria: Towards Resolving the Constitutional Controversy’ (2016) 19(1) International Arbitration Law Review 1,5.

<sup>240</sup> Adewale Olawoyin, ‘Charting New Waters with Familiar Landmarks’ (2009) 26(3) Journal of International Arbitration 373, 380.

incidental when it is related to or accompanies something important while something is supplemental when it is added to a thing to complete a deficiency in it.<sup>241</sup>

Dr Adaralegbe also adopted a contrary position to that of the Committee and instead argued that a combined reading of *Section 4(4) of the Constitution*, which grants the National Assembly the power to make laws on matters stipulated by the Constitution and *Section 12(2) of the same Constitution*, which enables the National Assembly to make laws for the purpose of implementing a treaty, also empowers the National Assembly to make a national arbitration law.<sup>242</sup> He based his argument on the premise that the Nigerian Arbitration and Conciliation Act was enacted in part to give effect to the New York Convention and so the said Act is clearly within the jurisdiction of the National Assembly.<sup>243</sup>

In response to Dr Adaralegbe's position, Dr Olawoyin contended that the New York Convention does not need to be incorporated via a substantive Arbitration Act. He further argued that in situations like the *Section 12(2)* of the Constitution position, the Nigerian legislature has in the past enacted a short statute solely for the purpose of domesticating a relevant treaty and that in line with this practice, *Schedule 2 of the Nigerian Arbitration Act*, which incorporates the New York Convention is unnecessary. He concluded by submitting that to the extent that the Constitution does not stipulate which of the legislative bodies is bestowed with jurisdiction over arbitration matters, the State House of Assembly is properly seised of same as it is by implication considered to be on the residuary legislative list.<sup>244</sup>

Notwithstanding Dr Olawoyin's very convincing argument, this writer points out that the New York Convention does not prescribe any specific form by which it should be domesticated in signatory countries. Secondly, the fact that the National Assembly has

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<sup>241</sup> The Committee commissioned by the Lagos State Government to draw up the Lagos State Arbitration Law 2009, submitted that the conclusion reached by the Federal Government's Committee was a "contrived solution untenable under our law and Constitution." See Lagos State Arbitration Committee Report, 21.

<sup>242</sup> Adebayo Adaralegbe, 'Challenges in Enforcement of Arbitral Award in Capital-Importing States; The Nigerian Experience' (2006) 23 *Journal of International Arbitration* 401, 408.

<sup>243</sup> The New York Convention is contained in Schedule 2 of the Nigerian Arbitration and Conciliation Act.

<sup>244</sup> Adewale Olawoyin (n 3) 386.

always adopted a particular method of domesticating international law is not enough reason to insist on it as a general rule. To the extent that there is no law or rule requiring that international treaties be domesticated in a particular form or manner, the National Assembly has the discretion to domesticate law in any practical way it deems fit. In the case of the Nigerian Arbitration Act, since it was enacted after the New York Convention 1958,<sup>245</sup> it was more practical and definitely more efficient to kill two birds with one stone by enacting an Act and domesticating the treaty in the same Act rather than enacting two different Acts on similar issues.

Between the arguments of the Committee, Dr Adaralegbe and Dr Olawoyin, it seems that Adaralegbe makes the most convincing argument. However, his position does not cover the validity of the domestic arbitration aspect of the Act, since the New York Convention is without any doubt an international arbitration instrument. It is therefore not possible to extend the implication of *Section 12(2) of the Constitution*, which arguably empowers the National Assembly to enact an international arbitration law to also cover domestic arbitration. This brings us back to the controversy as to the constitutional basis of at least the domestic arbitration and the conciliatory aspect of the Nigerian Arbitration and Conciliation Act 2004.

This writer is of the opinion that the controversy regarding the validity of the existing Nigerian Arbitration Act is unnecessary in the first place. This is in view of *Section 315 of the Constitution*, which converts every pre-democratic decree of the Military Government to an Act of the National Assembly. In other words, the Nigerian Arbitration and Conciliation Act is for all intents and purposes a valid Act of the National Assembly. Besides, the Supreme Court held in *Attorney General of Ogun State v Aderuagba*<sup>246</sup> that the mere fact that an item is not specifically listed in the exclusive list is not enough reason to hold that the National Assembly lacks jurisdiction over such a matter. In the court's view, all the provisions of the Constitution on the issue must be read together and not disjointedly. This decision implies that the legislative jurisdiction of the National Assembly can also be implied from other sections of the

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<sup>245</sup> As we previously mentioned, while the New York Convention came into existence in 1958, the Nigerian Arbitration Act was originally introduced as a decree in 1988.

<sup>246</sup> (1985) 1 NWLR (Pt 3) 395.

Constitution. It is within this context that *Section 315 of the Constitution* is submitted to be applicable.

It is therefore submitted that until such a time as when the existing Act is repealed or replaced with a new Act, the National Assembly definitely has the jurisdiction to amend the existing Act like it would amend any of its other existing laws. In other words, the National Assembly has power to legislate on the existing Arbitration and Conciliation Act (which includes domestic and international arbitration) until such a time as when it is repealed or deemed to be void by the courts. In any of the aforementioned situations, this writer agrees with Olawoyin only to the extent that the State House of Assembly has jurisdiction to enact a new domestic arbitration law in Nigeria. As it relates to international arbitration, this writer agrees with Adaralegbe only to the extent that the National Assembly has jurisdiction to enact a new international arbitration law.<sup>247</sup>

In view of the foregoing discussion, what then is the status of existing State Arbitration laws like the Lagos State Arbitration Law 2009? This writer adopts Olawoyin's submission when he says that because the Constitution is silent on which of the legislative bodies has the power to make arbitration laws, the State House of Assembly also has the right to legislate on issues relating to arbitration, since the Constitution allows the State Houses of Assembly to make laws on matters not within the exclusive jurisdiction of the National Assembly.<sup>248</sup>

However, in a situation in which there is any inconsistency between the Arbitration Act and the Arbitration law of any State, the Constitution provides that "the law made by the National Assembly shall prevail and that other law shall to the extent of its inconsistency, be void."<sup>249</sup> State arbitration laws are therefore valid to the extent of their consistency with the Arbitration Act, which is a federal legislature.<sup>250</sup> In addition, by virtue of the doctrine of covering the field, a State law like the Lagos State

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<sup>247</sup> In our recommendation chapter, we argue that domestic arbitration is best suited as a Federal law and so we make a case for constitutional reforms.

<sup>248</sup> 1999 Constitution of the Federal Republic of Nigeria, section 4.

<sup>249</sup> *ibid* section 4(5).

<sup>250</sup> Paul Idornigie, 'The Doctrine of Covering the Field and Arbitration Laws in Nigeria' (2000) 66(3) *Arbitration* 193 198.

Arbitration Law 2009 has jurisdiction over issues not expressly covered by the Act.<sup>251</sup> A good example of such issues will include disputes of a non-commercial nature, since the Nigerian Arbitration Act clearly limits its jurisdiction to commercial disputes.

If we then say that both the laws of the National Assembly and the House of Assembly are valid, which of these laws is applicable in any given domestic commercial arbitration dispute? Going by the doctrine of party autonomy, parties have a choice to choose between any of the applicable frameworks. However, when parties fail to clearly choose the applicable law, the Nigerian and Conciliation Arbitration Act is by default the applicable law.<sup>252</sup>

Another issue for consideration arises from the fact that the Act limits its application to the “fair and efficient settlement of commercial disputes.”<sup>253</sup> In other words, non-commercial disputes are not arbitrable under the Act. This therefore in a way disqualifies arbitration from providing an all-round “alternative” to litigants.

The writer submits that a statutory amendment, at least for a start is a more feasible and practical solution to this issue since as it is, the validity of the Act is not in question. It is suggested that the scope of the Act be extended beyond commercial disputes. This can easily be done by deleting the word “commercial” from the preamble. It is easier for the Federal Government to amend this Act, than to convince each of the thirty-six (36) individual States in Nigeria to adopt a new uniform law.

#### **5.4 Party Autonomy**

It is clear from a general perusal of the Act that the draftsman sought to keep a tight rein on the domestic arbitration practice in Nigeria. For instance, *Section 15(1) of the Act*<sup>254</sup> which governs domestic arbitration proceedings, provides that “the arbitral proceeding shall be in accordance with the procedure contained in the Arbitration

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<sup>251</sup> For a detailed discussion on the doctrine of covering the field in Nigeria, see the case of *The Council of the University of Ibadan v. Adamolekun* (1967) 1 All NLR 213,214; *Lakanmi v Attorney General of Western Nigeria* (1970) 6 NSCC 143 amongst others.

<sup>252</sup> Adedoyin Rhodes-Vivour, ‘Recent arbitration related developments in Nigeria’ (2012) 76(1) Arbitration 130,131.

<sup>253</sup> See the Preamble to the Act.

<sup>254</sup> Chapter A18, Laws of the Federation of Nigeria 2004.

Rules set out in the First Schedule to this Act”.<sup>255</sup> Interestingly, in its provision for international arbitration, the Act provides that “Notwithstanding the provisions of this Act, the parties to an international commercial agreement may agree in writing that disputes in relation to the agreement shall be referred to arbitration in accordance with the Arbitration Rules set out in the First Schedule to this Act, or the UNCITRAL Arbitration Rules or any other international arbitration rule acceptable to the parties”.<sup>256</sup> We see the draftsman limiting the options available to parties to a domestic arbitration as against their international arbitration counterpart, who more or less have the freewill to decide the rules governing the procedure of their proceedings.

It is submitted that *Section 15 of the Act* negates the principle of party autonomy. The practice of arbitration is built on party autonomy; parties freewill to decide on the process by which their disputes will be governed. A situation where the Act compulsorily dictates the process by which parties should arbitrate their dispute, defeats the very idea behind arbitration and therefore should be removed.

Proponents of *Section 15* may argue that the provision helps to protect weaker parties. Assuming without conceding that there is strength in this argument, the Act ought to make it a default option from which parties may decide to opt out if they so choose. Another approach is for the Act to make only certain fundamental provisions compulsory as against the practice of making the whole Arbitration Rules mandatory.

## 5.5 Stay of Proceedings

By virtue of the doctrine of autonomy, parties have the right to choose to determine their dispute through arbitration. The Nigerian Arbitration and Conciliation Act clearly provides that “the court shall not intervene in any matter governed by this Act”.<sup>257</sup> The effect of this is to more or less oust the jurisdiction of the court to resolve any arbitrable issue that parties have agreed to submit to arbitration.

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<sup>255</sup> Article 1 of the said Rules defines its scope.

<sup>256</sup> Arbitration and Conciliation Act, section 53.

<sup>257</sup> *ibid*, section 35.

This issue of jurisdiction is fundamental and essential to adjudication.<sup>258</sup> According to the Supreme Court in *Odoemena Nwaigwe & ors v. Nze Edwin Okere*,<sup>259</sup> jurisdiction is the life wire or blood that gives life to any adjudication in whatever system of law that comes into focus. It rubs on the competence of a court to hear and decide a matter.<sup>260</sup> In fact, the courts have opined that jurisdiction is tantamount to competence.<sup>261</sup> Furthermore, it has been held that it “is the very basis on which any tribunal tries a case. It is the life line of all trials. A trial without jurisdiction is a nullity”.<sup>262</sup> Where a court does not have jurisdiction over a matter and it proceeds to hear and determine the matter, the whole proceedings, no matter how well decided, would amount to a nullity. This is premised on a position of the law that a judgment given without jurisdiction creates no legal obligation.<sup>263</sup> In addition, in *Hon-Justice Raliat Elelu-Habeeb (Chief Judge of Kwara State) & anor v. The Hon Attorney General of the Federation & 2 ors*,<sup>264</sup> it was held that the moment a defendant or respondent as the case may be, satisfies the court that it has no jurisdiction, the foundation of the case is destroyed. In other words, the court is prevented from adjudicating on the matter and cannot hear the parties any longer. All these imply that an action brought in disregard of an arbitration agreement cannot stand and should not exist under law.

It is therefore surprising when one sees that in response to an action brought in total disregard of an arbitration agreement, the Act mandates the court to make an order of stay of proceedings “if any party to an arbitration commences any action in any court with respect to any matter which is the subject matter of an arbitration...”<sup>265</sup> The Supreme Court of Nigeria has held that the main purpose of an order of stay of proceedings is to preserve the litigation and its subject matter.<sup>266</sup> The court more or less “presses pause” on the said action, usually pending the determination of an

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<sup>258</sup> *Dr Taiwo Oloruntoba Oju & 4 ors v Prof. Shuaib O. Abdul Raheem & 3 Ors* (2009) 5-6 SC (Pt II) 57.

<sup>259</sup> (2008) 5-6 SC (Pt II) 93.

<sup>260</sup> *Forestry Research Institute of Nigeria v. Mr I.A Enaifoghe Gold (incomplete)* (2007) 5 SCNJ 302,382.

<sup>261</sup> *Hon Donegbue v. Hon E.O Araka* (1988) 7 SC (Pt III) 98.

<sup>262</sup> *Texaco Overseas (Nig) v. Peomar Nig Ltd* (2002) 12 SCM.

<sup>263</sup> *Agbule v Warri Refinery & Petrochemical Co ltd* (2012) 12 SC (Pt VII) 112.

<sup>264</sup> (2012) 2 SC (Pt 1) 145.

<sup>265</sup> Arbitration and Conciliation Act, section 5(1).

<sup>266</sup> *United Spinners v Chartered Bank Limited* (2001) 9 SCM.



appeal.<sup>267</sup> Parties therefore resume the said action (from where they stopped) when the reason for the stay has been removed. It is submitted that by granting an order of stay, the court is more or less perpetuating an illegal action.<sup>268</sup>

If we have said that the courts lack jurisdiction to determine any dispute which parties have agreed should be resolved by arbitration (and it is in fact a nullity under the law), can we legally speaking say there is a validly existing matter to stay? This is clearly not possible especially when we take into consideration the case of *Attorney General of Kwara State v. Olawale*,<sup>269</sup> where the Supreme Court held that jurisdiction can only be assumed when the person bringing an action and the subject matter of the action are properly before the court.

Assuming without conceding that an order of stay of proceeding has even been issued, it is trite law that you cannot build something on nothing. Flowing from this principle of law, it is in fact impossible to “resume” an action which did not exist in the eyes of the law. The said action is for all intents and purposes, dead on arrival. In the opinion of this writer, by purportedly granting an order of stay of proceedings, a court is by implication cloaking an otherwise invalid action with some form of validity. In *Haliu Akilu v. Chief Gani Fawehinmi*,<sup>270</sup> the court held that a stay is not to be granted to a party who cannot after all is said and done, establish any prima facie claim in law. It is submitted that it is this very claim in law that defeats the continued existence of the action in the first place as the existence of a dispute which is the subject matter of an arbitration is the very reason why the action was stayed by the court in the first place.

What then should be the right approach of the court? It is submitted that the right approach of the court ought to be an order striking out the matter from court. The Supreme Court has held in *Tsokwa Motors (Nig) Ltd v United Bank for Africa Plc* that where a court is found to lack jurisdiction to entertain a particular matter, the proper order to make is a “striking out”.<sup>271</sup> The court has also held that an order of strike out

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<sup>267</sup> *Nika Fishing Co Ltd v Lavina Corporation* (2008) 6-7 SC (Pt II) 200.

<sup>268</sup> This writer admits that this practice is not only limited to Nigeria. For example, see Section 9 of the English Arbitration Act 1996.

<sup>269</sup> (1993) 1 SCNJ 208.

<sup>270</sup> (1989) 3 SC (Pt II) 1.

<sup>271</sup> (2008) 1 SCNJ 323.

implies that the case has been removed from the courts cause list. The decision does not constitute a determination of the rights of the parties. A decision of the court to strike out the case is a decision that the court will not hear the case.<sup>272</sup> Either party is allowed to institute an action on the same issues when the impediment that caused the strike out in the first place has been cured. This is as against a dismissal of action where neither party is allowed to institute an action touching on any of the dismissed issues.<sup>273</sup>

Admittedly, it is possible to argue that staying as against striking out the matter provides better security especially as it relates to limitation of time.

## 5.6 The Number of Arbitrators

According to *Section 6 of the Act*, parties to an arbitration have the choice to determine the number of arbitrators that will make up their tribunal. When they however fail to do this, the Act stipulates a default number of three.

The reform Committee however suggests that this number be reduced to one arbitrator. The Committee in arriving at this conclusion referred to the conclusion reached by both the Departmental Advisory Committee in England and the UNCITRAL Working Group. While the DAC opined that a default provision which prescribes a three-person arbitrator panel would amount to unnecessary expense, the UNCITRAL Working Group advocated for a three-person tribunal in order to guarantee equal treatment of both parties.

Cost remains a major consideration especially in a country like Nigeria which still has high concentrations of poverty. According to a BBC news report. "Poverty has risen in Nigeria with almost 100 million living on less than a \$ 1 (£0.63) a day, despite economic growth..."<sup>274</sup> A one-person tribunal is therefore more practical.<sup>275</sup>

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<sup>272</sup> *Micheal Ezenwa v I.O Olalekan Kareem* (1990) 5 SC (Pt II) 66.

<sup>273</sup> *Nigerian Airways Limited v Lapite* (1990) 11-12 SC 60.

<sup>274</sup> BBC editorial, 'Nigerians Living in Poverty rise to nearly 61%' *BBC News* (13 February 2012) <<http://www.bbc.co.uk/news/world-africa-17015873>> accessed 20 November 2015.

<sup>275</sup> We discuss this issue at various points in this thesis- See Section 1.1.2 of Chapter Six, Section 3.2 of Chapter Six and Section 2.1.4 of Chapter Seven.

## CONCLUDING REMARKS

In this chapter, we have not only highlighted some of the problems of the Nigerian Arbitration Act, we have also made a number of recommendations, in a bid to improve the domestic arbitration practice in Nigeria.

To develop a more effective and tailored domestic arbitration practice for Nigeria, we will in subsequent chapters examine related arbitration practices. For example, since the introduction of the Nigerian Arbitration and Conciliation Act in 1988, a number of beneficial developments have occurred within the sphere of arbitration and from which the practice in Nigeria can learn a lesson or two.

More immediately however, we will in the next chapter examine the customary arbitration practice in Nigeria. This customary method was at a time in history the only practical method of resolving civil disputes in Nigeria.<sup>276</sup> Of all the precolonial methods of resolving disputes, customary arbitration still remains a legally recognised mechanism in Nigeria.

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<sup>276</sup> O. Ezediaro, 'Guarantee and incentives for Foreign Investment in Nigeria' (1971) 5 International law 770, 775.

## CHAPTER FIVE

### **CUSTOMARY ARBITRATION IN MODERN NIGERIA**

#### INTRODUCTION

In Chapter Two of this thesis, we discussed in detail the problems encountered in the administration of justice by Nigerian courts. We concluded that chapter by recommending the development of a suitable domestic arbitration framework as a solution to these problems. This recommendation is the main aim of this PhD thesis.

In order to achieve this recommendation, it is necessary to acknowledge and examine existing arbitration frameworks in Nigeria by way of background. Chapter Three therefore introduced a reader to the general principles and practice of arbitration and concluded by highlighting the existing arbitration frameworks in Nigeria. While in Chapter Four we critically examined the existing Arbitration and Conciliation Act 2004 in Nigeria,<sup>1</sup> in this chapter, we focus on the home grown arbitration practice called customary arbitration.<sup>2</sup>

Two important things need to be emphasised right from the beginning of this discussion. The first is to reiterate the distinction made in Chapter Two between customary arbitration and other customary methods of dispute resolution in Nigeria. It should be recalled that we mentioned that of all the pre-colonial methods of resolving disputes in Nigeria,<sup>3</sup> customary arbitration remains the only legally binding method in modern Nigeria. In fact, a successfully concluded customary arbitration proceeding constitutes an estoppel against future proceedings on the determined issues.<sup>4</sup> No other customary method enjoys this privilege. Like arbitration in the traditional sense in which it is known, the aforementioned assertion is however subject to the proof of certain conditions.<sup>5</sup>

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<sup>1</sup> Chapter A18 of the Laws of the Federation of Nigeria 2004.

<sup>2</sup> This practice is regulated by case law and so our discussion on this subject will examine the practice as recognised by case law.

<sup>3</sup> It should be recalled that in Chapter Two, we mentioned that the pre-colonial methods of resolving dispute in Nigeria are the Kings' Traditional Court, customary mediation and customary arbitration

<sup>4</sup> *Okparaaji v Ohanu* (1999) 9 NWLR (Pt 618) 280.

<sup>5</sup> We discuss this further in this chapter.

Another important point to note is that the modern version of this practice is relatively new and so academic discussions on the subject are rather sketchy. As Dr Igbokwe rightly pointed out, “until comparatively recently, not much effort has been made toward putting the law and practice of customary arbitration in a proper perspective”.<sup>6</sup> He however rightly submitted that discussions picked up after the locus classicus case of *Agu v Ikewibe*,<sup>7</sup> which laid the foundation for the modern practice of customary arbitration in Nigeria.<sup>8</sup> Unfortunately most of these discussions have centered on a very controversial part of the judgement; the issue relating to the parties’ right to resile. The 2010 decision of the court in *Agala v Okusin*<sup>9</sup> however seems to have settled this controversy and so it is hoped that more robust discussions would emerge on the subject.<sup>10</sup>

This chapter is divided into four major parts. The first part of this chapter introduces the reader to a more detailed discussion of the customary arbitration practice as it operated in pre-colonial Nigeria. In the second part, we proceed to modern Nigeria and highlight the initial controversy surrounding the existence of this practice in Nigeria. This controversy raged until the aforementioned case of *Agu v Ikewibe*.<sup>11</sup> We analyse the decision of the Nigerian Supreme Court (“the Supreme Court”) in this case and highlight the issues arising therefrom. We also critically examine the opinions of writers on controversial aspects of the decision. With respect, this chapter will differ from this Supreme Court’s decision with reasons. In the third part of this work, we critically analyse recent developments in the law governing customary arbitration. We conclude this chapter by making a case for reforms. Specifically, we advocate for the incorporation of the case law on customary arbitration into the domestic arbitration framework of the Nigerian nation.<sup>12</sup>

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<sup>6</sup>Virtus Chitoo Igbokwe, ‘The Law and Practice of Customary Arbitration in Nigeria: *Agu v Ikewibe* and Applicable law issues revisited’ (1997) 41 *Journal of African Law* 201, 202.

<sup>7</sup> (1991) 3 NWLR PT 180.

<sup>8</sup> *ibid.*

<sup>9</sup> (2010) 10 NWLR (PT 1202) 412.

<sup>10</sup> We discuss this decision in more detail in Section 2.4 of this chapter.

<sup>11</sup> (1991) 3 NWLR PT 180.

<sup>12</sup> Ghana did something similar in their recent Alternative Dispute Resolution Act 2010. We discuss this in Section 1.1.3 of Chapter Six.

## 1.0 BACKGROUND

According to Professor Jan Paulsson, “the idea of arbitration is that of binding resolution of disputes accepted with serenity by those who bear its consequences because of their special trust in chosen decision makers”.<sup>13</sup> This idea is not alien to Nigeria. In fact, prior to the colonization of Nigeria, arbitration was a predominant method of resolving civil disputes.<sup>14</sup> According to Ezediario, in many isolated communities, “referral of a dispute to one or more laymen for decision...was the only reasonable one, for the wise men or the chiefs were the only accessible judicial authorities”.<sup>15</sup> This practice has since been referred to by the Supreme Court of Nigeria (“the Supreme Court”) as customary arbitration.<sup>16</sup>

The Supreme Court in the case of *Agu v Ikewibe*<sup>17</sup> defined customary arbitration as the “voluntary submission of the parties, to the decisions of the arbitrators, who are either the chiefs or elders of the community, and the agreement to be bound by such decisions or freedom to resile where unfavourable.”<sup>18</sup> In his contribution, Edwin Ezike referred to it as “the settlement of a dispute by a neutral body other than a court of law, in a juridical manner with its firm anchorage on the customs and way of life of the people”.<sup>19</sup>

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<sup>13</sup> Jan Paulsson, *The Idea of Arbitration* (Oxford University Press 2013) 1.

<sup>14</sup> B.O. Nwabueze, *Machinery of Justice in Nigeria* (Cambridge University Press 1963); Abdulmumini A. Oba, ‘Juju Oaths in Customary Law Arbitration and their legal validity in Nigerian Courts’ (2008) 52 *Journal of African Law* 139, 140; Ephraim Akpata, *The Nigerian Arbitration Law in Focus* (West African Books Publishers, Laos 1997) 1; Oluwafemi A. Ladapo, ‘Where does Islamic Arbitration fit into the Judicially Recognised Ingredients of Customary Arbitration in the Nigerian Jurisprudence’ (2008) 8(2) *African Journal on Conflict Resolution* 103, 110.

Paul Idornigie, ‘Overview of ADR in Nigeria’ (2007) 73(1) *Arbitration* 73; Adesina Bello, ‘Customary and Modern Arbitration in Nigeria: A recycle of Old Frontiers’ (2014) 2(1) *Journal of Research and Development* 50, 53; Andrew Chukwuemerie, ‘The Internationalisation of African Customary law arbitration’ (2006) 14(2) *African Journal of International and Comparative Law* 143.

<sup>15</sup> O. Ezediario, ‘Guarantee and incentives for Foreign Investment in Nigeria’ (1971) 5 *International law* 770, 775. See also Andrew Chukwuemerie, ‘Salient Issues in the Law and Practice of Arbitration in Nigeria’ (2006) 14 *African Journal of International and Comparative Law* 1, 5.

<sup>16</sup> *Agu v Ikewibe* (1991) 3 NWLR PT 180.

<sup>17</sup> *ibid.*

<sup>18</sup> We will see that this definition has been modified in later decisions.

<sup>19</sup> Edwin Obinna Ezike, ‘Halting the misconceptions relating to Customary Arbitration in Nigeria’ (2013) *International Arbitration Law Review* 1, 2.

Customary arbitration was a predominant method of resolving disputes in pre-colonial Nigeria.<sup>20</sup> Unlike the traditional court system, this system provided a flexible, simple and seemingly informal method of administering disputes in pre-colonial Nigeria.<sup>21</sup> Parties under this process had a say in the way their disputes were administered and the idea behind this process was to ensure justice and maintain peace within the community. Customary arbitration was a post dispute mechanism.<sup>22</sup>

The customary arbitration process was initiated when an aggrieved party (“claimant”) expressed his grievance to a neutral and respected elder.<sup>23</sup> Elders were assumed to be very knowledgeable of the customs of the community.<sup>24</sup> They were also assumed to be men of integrity, great wisdom and vast experience. Parties in a dispute were therefore expected to trust and tap from the rich wealth of knowledge and experience possessed by these elders.<sup>25</sup> The reason is adequately illustrated in a Yoruba<sup>26</sup> adage which states that “*Bi omode ba laso t’agba, ko le ni akisa t’agba*” which in literal terms means that “*even if a child has as much clothing as an old man, he cannot have as many rags as the old man does*”. Customary arbitrators therefore possessed and exercised adjudicatory powers like their European and statutory counterparts.<sup>27</sup>

It was the usual and rather unfortunate practice for only persons from the male gender to serve as arbitrators.<sup>28</sup> This was because at that point in history, women were

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<sup>20</sup> O. Ezediaro (n 15) 775; Andrew Chukwuemerie, “Salient Issues in the Law and Practice of Arbitration in Nigeria” (2006) 14 African Journal of International and Comparative Law 1,4.

<sup>21</sup> We draw a distinction between the pre-colonial methods in Section 1.0 of Chapter Two of this thesis.

<sup>22</sup> Gaius Ezejiolor, ‘The Nigerian Arbitration and Conciliation Act: A Challenge to the Court’ (1993) Journal of Business Law, 82,84.

<sup>23</sup> Andrew Chukwuemerie, ‘Salient Issues in the Law and Practice of Arbitration in Nigeria’ (2006) 14 African Journal of International and Comparative Law 1,4.

<sup>24</sup> L.A. Ayinla, ‘ADR and the Relevance of Native or Customary Arbitration in Nigeria’ (2009) 5 The University of Ilorin Law Journal, 254, 260; Andrew Chukwuemerie, ‘The Internationalisation of African Customary Law Arbitration’ (2006) 14(2) Africa Journal of International and Comparative Law 145, 150

<sup>25</sup> Anybody who disrespected an elder was regarded as a community troublemaker. For example, “*Ai fagba fenikan ni o je aye o roju*” when interpreted means “lack of respect of an elder is the root of community crisis”.

<sup>26</sup> Yoruba is the most widely spoken language in the South Western parts of Nigeria.

<sup>27</sup> George Elombi, ‘Customary Arbitration: A Ghanaian Trend Reversed in Nigeria’ (1993) 5 African Journal of International and Comparative Law 803, 807.

<sup>28</sup> Nonso Okerefoejeke, *Law and Justice in Post-British Nigeria: Conflicts and interactions between Native and Foreign Systems of social control in Igbo* (Greenwood Publishing 2002) 129.

regarded and treated as subordinate to men.<sup>29</sup> Men were however very reluctant to involve themselves in issues involving women and therefore left those to the women to settle among themselves.

Like arbitration in its contemporary sense, the consent of both parties was integral to the validity of the customary arbitration process. The elder selected by the claimant was therefore expected to call the other party (“respondent”) against whom an accusation had been made.<sup>30</sup> The respondent at this point had the option to choose if he wanted the dispute to be administered by the elder selected by the claimant. If he chose to submit to this particular elder’s jurisdiction, all the parties involved will be expected to agree on a date, place and time for the hearing of the case.<sup>31</sup>

Where the respondent disagreed with the claimant’s choice, both parties were expected to agree on a suitable elder. The elder eventually selected by both parties depended to a large extent on the relationship between them. For example, it was the usual practice to refer disputes between family members to the eldest male member of the family, who is usually the head of the family or lineage.<sup>32</sup> This was because parties were many times reluctant to wash their dirty linen in public by inviting non-members of the family into a family dispute.<sup>33</sup> On the other hand, a dispute between members of a particular trade or profession was usually referred to the head of the trade group and/or his executives.<sup>34</sup> Parties were willing to trust the judgement of their leaders because of the strict requirements needed to attain the position. In a dispute between heads of a family, the dispute would be referred to a jointly selected head of another family. In a dispute between two communities, delegates from both

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<sup>29</sup> D.A Offiong, ‘Conflict Resolution among the Ibibio of Nigeria’ (1997) Vol 53 Journal of Anthropological Research 423, 428.

<sup>30</sup> Judith Fumnanya Rapu, ‘Alternative Dispute Resolution of Indigenous African Disputes: An irrelevant Myth or Catalyst for Modern Global Relations?’ (2012) Nigerian Institute of Advanced Legal Studies Journal 271, 294.

<sup>31</sup> Taslim O. Elias, *The Nature of African Customary Law* (Manchester University Press 1956) 217

<sup>32</sup> Offiong (n 29) 438.

<sup>33</sup> O Adekile, ‘Legal Frameworks For Settling Marital Disputes through Reconciliation in Nigeria’ <[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1503384](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1503384)> accessed 22 June 2014.

<sup>34</sup> Ernest E Uwazie, ‘Modes of Indigenous Disputing and Legal Interactions among the Ibos of Eastern Nigeria’ (1991) Vol 34 Journal of Legal Pluralism and unofficial law 87.



communities were selected to be members of the arbitration community with a top chief from a neutral community acting as presiding arbitrator.<sup>35</sup>

Like in contemporary dispute resolution mechanisms, customary arbitrators were expected to accord parties a fair hearing.<sup>36</sup> In fact, there is a Yoruba adage which when interpreted means that “wicked and iniquitous is he who decides a case upon the testimony of only one party to it”.<sup>37</sup> Parties were also commonly entitled to some form of legal representation especially in disputes beyond the family level.

An important feature of the pre-colonial arbitration system was the swearing of oaths. In Nigeria and indeed Africa, swearing on oath involves recourse to the power of a supernatural being. It was usual for parties to swear on a native and very dreaded god called “juju”.<sup>38</sup> In an attempt to describe how the oath system worked, a writer submitted that “swearing on a dreaded juju is the commonest form of traditional oaths. Generally, the oaths are worded in such a way that the swearer invokes on himself a conditional curse. He tells the juju to punish him if he lies. Thereafter, all parties concerned with the dispute wait for a year. It is believed that anyone who swears falsely will be dead or smitten with grave misfortune within a year of taking the oath. If the dispute concerns land, the person who takes the oath enters and takes possession of the land. Should any misfortune befall him within the prescribed period, the property reverts to the other party. There is no need for any further judicial decision as his relatives will be too anxious to give up the property lest any further harm befalls them also. If he survives for a year after taking the oath without death or any serious illness, he retains the property as he is deemed to have told the truth. Where a party was ordered to proffer a juju for the other party to take an oath on and no juju is produced by that party, the other party is judged the truthful party.”<sup>39</sup> This

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<sup>35</sup> D.A. Offiong (n 29) 431.

<sup>36</sup> L.A. Ayinla (n 24) 261.

<sup>37</sup> The original proverb in Yoruba is “*A gbo ejoenikan da, agba osika ni*”.

<sup>38</sup> Martin Chukwuka Okany, *The Role of Customary Courts in Nigeria* (Fourth Dimension Publishing Co Ltd 1984) 5.

<sup>39</sup> Abdulmumini A. Oba, ‘Juju Oaths in Customary Law Arbitration and their legal validity in Nigerian Courts’ (2008) 52 *Journal of African Law* 139, 141.

made the decision making process very easy as nobody was willing to risk the negative effects of this juju.

When the arbitral process had been concluded, the arbitrators were expected to issue an award. It was very common for the arbitrators to “indulge in end-of trial judicial homilies to the parties”.<sup>40</sup> These homilies were both instructive as well as edifying. The arbitrator’s decision was punctuated at appropriate stages with allusions to the legal principles involved. The arbitrator had the enormous responsibility of doing justice so as “to command the respect and approval of the overwhelming majority of the people”.<sup>41</sup>

Parties usually abided by the decision of the arbitrators. This as we have seen and will still see was as a result of a deep rooted respect for tradition and religion. It was believed that there were serious repercussions when an individual went against tradition by disobeying the words of an elder.

However, the colonization of Africa, the rise in the influence of “foreign” religions (Christianity and Islam)<sup>42</sup> and the westernization of Nigeria has reduced the influence of customary law, practice, beliefs and religion.<sup>43</sup> As the learned Dr Oba rightly noted in his article, “before the colonial era, customary law operated freely within its area of influence as a complete and independent legal system. However, the arrival of the colonialists in the 19<sup>th</sup> century had a revolutionary impact on the pre-colonial systems of adjudication generally and the use of oaths in the judicial process in particular. For one thing, the judicial system introduced by the colonial masters gained ascendancy over traditional judicial systems, and customary law was enforced on terms dictated by the colonial authorities.”<sup>44</sup> Furthermore, the Constitution and statutory laws existing in Nigeria have made customary law applicable only to the extent of its

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<sup>40</sup> Taslim Elias (n 31) 272.

<sup>41</sup> *ibid.*

<sup>42</sup> Statistics shows that Christianity and Islam are presently the most practised religions in Nigeria with practitioners of the African religion being in the minority. See: [www.nigerianstat.gov.ng/sectorstat/sectors/Religion%20and%20Related%20Activities](http://www.nigerianstat.gov.ng/sectorstat/sectors/Religion%20and%20Related%20Activities) accessed 14 December 2015.

<sup>43</sup> See Chapters One and Two of Nikki Tobi, *Sources of Nigerian Law* (MIJ Professional Publishers, Lagos 1996) and Akintunde Obilade, *The Nigerian Legal System* (Spectrum Books Ltd 1979).

<sup>44</sup> Abdulmumini A. Oba (n 39) 140.

consistency with any law in force in Nigeria. We therefore see a slightly evolved system of arbitration in Nigeria today.

Whatever the case is however, customary arbitration remains a valid and legally recognised method of resolving disputes in Nigeria.

## **2.0 CUSTOMARY ARBITRATION IN MODERN NIGERIA**

### **2.1 Initial Controversies relating to the Existence and Validity of Customary Arbitration**

A fast-forward to post-colonial Nigeria will reveal that there were initial doubts about the existence of this practice in post-colonial Nigeria.

A scholar like the late Professor Allot for example, vehemently argued against the existence of customary arbitration in Nigeria and indeed Africa. He was of the opinion that what Africans regarded as arbitration was a system of negotiation. His opinion was based on what he considered to be the absence of an established method of enforcing customary arbitration awards.<sup>45</sup> In fact in a more recent article,<sup>46</sup> he went ahead to criticise the Ghanaian courts for acknowledging the existence of customary arbitration in Ghana.<sup>47</sup>

The Nigerian Court of Appeal (“The Court of Appeal”) in the case of *Okpuruwu v Okpokam*<sup>48</sup> seemed to adopt Professor Allot’s opinion when a majority panel held that customary arbitration was not a recognised practice in Nigeria.<sup>49</sup> The dispute in *Okpuruwu v Okpokam*<sup>50</sup> was a claim of customary right of occupancy over a piece of land in Cross River State, Nigeria. Both parties jointly referred the dispute to a selected council of chiefs for a decision, consequent upon which an award was given in favour

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<sup>45</sup> Antony Allot, *Essays in African Law* (London 1960) 126.

<sup>46</sup> Antony Allot, ‘Customary Arbitration in Nigeria: A comment on *Agu v Ikewibe*’ (1998) 42 *Journal of African Law* 231, 234.

<sup>47</sup> For example, see the Ghanaian courts decision in *Foli v Akese* (1930) 1 WACA 1; *Kwasi v Larbe* (1952) 13 WACA 76; We discuss the Ghanaian position in Chapter six of this thesis.

<sup>48</sup> (1988) 4 NWLR PT 90 554 at 586.

<sup>49</sup> Before this decision, the lower courts in Nigeria had conflicting opinions on this matter. See the following cases; *Eqwere Inyang v Simon Essien* (1957) 2 F.S.C 39, *Oline v Obodo* (1958) 3 F.S.C 84, *Phillip Njoku v Felix v Ehiobu* (1972) ECNLR 199 and *Ofomata v Awka* (1974) 4 ECSLR 251.

<sup>50</sup> (1988) 4 NWLR PT 90 554.

of the plaintiff. In order to enforce his award, the plaintiff successfully instituted an action at the High Court for an enforcement order.

The defendant being dissatisfied with both the award and the subsequent order of the High Court appealed to the Court of Appeal. It was his submission that it was wrong for the High Court judge to recognise an award emanating from a customary arbitration tribunal. He further submitted that customary arbitration was not recognised both under the Nigerian constitution and the customary law of the Nigerian people.<sup>51</sup> The lead judge, Honourable Justice Uwaifo JCA (as he then was) in his judgement set aside the High Court's decision. He noted "how most inappropriate it would seem to appear when a reference of a land dispute of some intricacy is made to a council of chiefs or so called customary arbitrators without judicial functions either by the court or on the initiatives of the parties...To talk of customary arbitration (having a binding force as a judgement) in this country is therefore somewhat a misnomer and certainly a misconception. I do not know of any community in Nigeria which regards the settlement by arbitration between disputing parties as part of its native law and custom".

It is worthy of note that the panel of judges sitting on the *Okpuruwu v Okpokam*<sup>52</sup> case was split. Honourable Justice Oguntade JCA (as he then was) in his minority judgement held that he found himself "unable to accept the proposition that there is no concept known as customary arbitration in our jurisprudence...I do not think it is contrary to public policy and not in accordance with natural justice, equity and good conscience for parties to a dispute to submit to the adjudication of a third party in whom the disputants have confidence both as to impartiality and competence. The orthodox arbitration which has been accepted as part of the general law also operates on such principles of voluntary submission to the adjudication of a third party. I am unable to accept that native arbitration in any way derogates from the exercise by the regular courts of the powers vested in them by the 1979 (now 1999) constitution of Nigeria." He went further to state that "In the pre-colonial times and before the advent

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<sup>51</sup> *ibid* 566.

<sup>52</sup> (1988)4 NWLR PT 90 554 at 586.

of the regular courts, our people (Nigerians) certainly had a simple and inexpensive way of adjudicating over disputes between them. They referred them to elders or a body set up for that purpose. The practice has over the years become strongly embedded in the system that they survive today as custom....” He however added that “...the decision of arbitration, whether native or orthodox, lacks intrinsic or inherent force until pronounced upon by competent judicial authority. So at the end of the day, it is the court that baptizes an arbitration decision, giving it in the process the power to operate as estoppel par rem judicatam...If the court notices that there has been infractions of the rules on natural justice in the arbitration process or there are errors on the face of the award, the court simply sets it aside”.<sup>53</sup> Unfortunately, notwithstanding the correct submission made by Honourable Justice Oguntade, the majority decision of the court in *Okpuruwu v Okpokam*<sup>54</sup> remained the law.<sup>55</sup> This was the position until the decision of the Supreme Court in *Agu v Ikewibe*.<sup>56</sup>

## 2.2 **Agu v. Ikewibe: The Making of a Locus Classicus**

The dispute in *Agu v Ikewibe*<sup>57</sup> was whether a disagreement over title to land had been validly resolved by customary arbitrators consisting of village elders. Counsel to the appellant relied substantially on the earlier decision in *Okpuruwu v Okpokam*<sup>58</sup> and again submitted that customary arbitration was contrary to *Section 6(1) and (5) of the 1979 Nigerian Constitution*,<sup>59</sup> which according to him vested all forms of judicial power in the courts. The summary of the respondents’ argument on the other hand was that the said customary arbitration proceeding and award were valid. The High Court dismissed the respondents’ attempt to enforce the customary arbitration, after which the matter went on appeal. The Court of Appeal overturned the decision of the High Court and upheld the customary arbitration proceedings between the parties. The appellant being dissatisfied with the decision, appealed.

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<sup>53</sup> *ibid.*

<sup>54</sup> *ibid.*

<sup>55</sup> The doctrine of stare decisis is fully operative in Nigeria. The decision was therefore binding on all lower courts until it was overturned by the Supreme Court.

<sup>56</sup> (1991) 3 NWLR PT 180.

<sup>57</sup> *ibid.*

<sup>58</sup> (1988)4 NWLR PT 90 554 at 586.

<sup>59</sup> This was the Constitution in force at that time.

The Supreme Court rejected the appellant's argument and overruled the decision of the Court of Appeal in *Okpuruwu v. Okpokam*.<sup>60</sup> The Court by this decision put to rest the controversy surrounding the existence of customary arbitration and emphasized its place both under Nigeria's customary law and within the Nigerian legal system.

The Supreme Court's decision in *Agu v Ikewibe*<sup>61</sup> is a milestone in Nigerian jurisprudence for many reasons. For one, it brought an end to the controversy surrounding the existence of the customary arbitration practice in Nigeria.<sup>62</sup> The decision also enriched the academic debates on this subject. As previously mentioned, Dr Igbokwe pointed out that "until comparatively recently, not much effort has been made toward putting the law and practice of customary arbitration in a proper perspective."<sup>63</sup> He went ahead to point out that *Agu v Ikewibe*<sup>64</sup> was the turning point.

The decision also reaffirmed the place of customary law in Nigeria's jurisprudence. The Supreme Court held that customary law was an existing law in Nigeria as it was saved by *Section 274 of the 1979 Constitution*.<sup>65</sup> This section of the Constitution allowed for the application of customary law to the extent that it was not inconsistent with the Constitution or any other law in force in Nigeria.<sup>66</sup>

The decision laid the foundation for the development of a modern customary arbitration practice. The decision changed the status of the customary arbitration practice from an unregulated practice to one now regulated by the Nigerian courts. For a customary arbitration to be legally binding in modern Nigeria, parties are required to approach a competent court of law for an enforcement order.<sup>67</sup> It is submitted that the need to prove certain conditions in a court of law even after an arbitral award marks a fundamental difference between pre-colonial customary arbitration and its modern counterpart. In other words, although the modern customary arbitration practice assumes the same process as the pre-colonial

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<sup>60</sup> (1988) 4 NWLR PT 90 554 at 586.

<sup>61</sup> (1991) 3 NWLR PT 180.

<sup>62</sup> Judith Fumnanya Rapu (n 30) 298; George Elombi (n 27) 803.

<sup>63</sup> Virtus Chitoo Igbokwe (n 6) 202.

<sup>64</sup> (1991) 3 NWLR PT 180.

<sup>65</sup> The current provision is in Sections 315(3) and (4)(b) of the 1999 Constitution of Nigeria.

<sup>66</sup> See also the case of *Adesubokan v Yinusa*, *Nigerian Lawyers Quarterly*, Vol. VI. Nos 1-4, 186.

<sup>67</sup> Gaius Ezejiofor (n 22) 84.

customary arbitration process described above,<sup>68</sup> the difference between both systems is that the modern process does not end with the arbitrator's award. Legally speaking, the modern customary arbitration process only ends when the court issues or refuses to issue an enforcement order.

In order to obtain an enforcement order from the court, certain conditions need to be established. These conditions were originally laid down in *Agu v Ikewibe*:<sup>69</sup>

### **2.2.1 *The Voluntary Submission of the Dispute to the Customary Arbitrators.***

An arbitrator's jurisdiction can only be derived from the joint agreement of parties. We have seen in the course of this chapter that the process of obtaining the joint agreement of parties depends on the circumstances of the case. A respondent has the option of adopting the claimant's choice of arbitrator. If for any reason the respondent is not satisfied with the claimant's choice, both parties to the dispute will be expected to jointly select an arbitrator to administer their dispute.

### **2.2.2 *The Willingness of the Parties to be bound by the Award.***

The intention of parties to be bound by the decision of the arbitrator is one of the unique features of arbitration in any legal system of the world. This feature not only emphasises the role of an arbitrator in the arbitral process, it also distinguishes arbitration from systems of alternative dispute resolution like mediation and negotiation. This is because unlike a negotiator and mediator who have what can be regarded as persuasive authority over the parties, an arbitrator has a defined and enforceable authority.<sup>70</sup> An arbitrator is not just assisting parties to reach an amicable settlement, he is actually resolving the dispute in the way he deems fit.<sup>71</sup> This therefore explains why under customary

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<sup>68</sup> Andrew Chukwuemerie, 'The Internationalisation of African Customary law arbitration' (2006) 14(2) African Journal of International and Comparative Law 143, 153.

<sup>69</sup> These conditions have been varied in *Agala v Okusin* (2010) 10 NWLR (Pt 1202) 412, as we eventually come to discuss in Section 2.4 of this chapter.

<sup>70</sup> Emmanuel Gaillard and John Savage (eds), *Fouchard Gaillard Goldman on International Commercial Arbitration* (Kluwer Law International 1999) 12.

<sup>71</sup> Micheal McIlwrath and John Savage, *International Arbitration and Mediation: A practical Guide*, (Kluwer Law International 2010) 5.

arbitration, only elders and persons of proven integrity are allowed to serve as arbitrators. One should also add that this condition stipulates that the willingness of the parties to abide by the decision of the arbitrators must exist from the very beginning of the proceedings.

### 2.2.3 *That Neither Party Resiled in the Course of or after the Proceeding.*

This condition is the most controversial of all the conditions prescribed in *Agu v Ikewibe*.<sup>72</sup> It requires that the agreement and willingness discussed above continue to exist till the end of the proceeding. This implies that neither of the parties is allowed to withdraw from the proceeding if he so chooses.

This position of the Supreme Court is contrary to the general principles of arbitration, which require a binding arbitration agreement.<sup>73</sup> "Once parties have validly given their consent to arbitration, that consent cannot be unilaterally withdrawn...Even if the agreement forms part of the original contract between the parties and that contract comes to an end, the agreement to arbitrate survives".<sup>74</sup> The importance attached to an agreement to arbitrate continues throughout the proceeding even till the award is given and enforced.

Gary Born in his contribution to this subject rightly submitted that "a defining characteristic of arbitration is that it produces a binding award that decides the parties' dispute in a final manner and is subject only to limited grounds for challenge in national courts. Arbitration does not produce a non-binding, advisory recommendation, which the parties are free to accept or reject..."<sup>75</sup> As was rightly noted by the learned authors of Redfern and Hunter on International Arbitration, this feature "distinguishes arbitration as a method of resolving disputes from other procedures, such as mediation and

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<sup>72</sup> (1991) 3 NWLR PT 180.

<sup>73</sup> Ilias Bantekas, *An Introduction to International Arbitration* (Cambridge University Press 2015) 16.

<sup>74</sup> Nigel Blackaby et al, *Redfern and Hunter on International Arbitration* (5<sup>th</sup> Edition, Oxford Press 2009) 14.

<sup>75</sup> Gary B. Born, *International Arbitration: Law and Practice* (Kluwer law International: Kluwer Law International 2012) 4.



conciliation..."<sup>76</sup> When parties opt for arbitration, they not only waive their right of access to the courts, they also put their dispute beyond the jurisdiction of the court. The courts<sup>77</sup> have made it a point of duty to grant interlocutory applications seeking to stay court proceedings initiated in total disregard of the agreement to arbitrate.<sup>78</sup>

This third condition as stipulated in *Agu v Ikewibe*<sup>79</sup> has led to a heated argument among academic writers. As *Dr Igbokwe* rightly noted, "although the Supreme Court settled the controversy surrounding the existence and constitutionality of customary arbitration, it seemingly deepened the debate as to ...whether the prior agreement of the parties to customary arbitration can be determined before and after the award. Can any of the parties resile from the arbitration at any point in the proceeding or reject the award if unfavourable?"<sup>80</sup>

This is discussed further in the course of this work.<sup>81</sup>

#### ***2.2.4 That the Said Proceeding was conducted in accordance with the Custom, Trade or Business of the People.***

Since customary arbitration is a product of customary law, the court has a duty to ensure that the arbitration proceeding in question was conducted in accordance with the customary law of the parties involved. This helps to achieve some standardisation and also eliminates injustice.

The process by which the court ensures that the arbitration proceeding was conducted in accordance with the custom, trade and business of the people is

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<sup>76</sup>Nigel Blackaby et al (n 74) 27.

<sup>77</sup>*Channel Tunnel Group Ltd v Balfour Beatty Construction* (1993) AC 334; *The Owners of the M.V. Lupex V. Nig. Overseas Chartering & Shipping Ltd* (2003) 10 SCM 71; *K.S.U.D.B. V. Fanz Construction. Co Ltd* (1990) 6 SC 103.

<sup>78</sup> This writer acknowledges that there are varying opinions on whether parties should in some instances be allowed to resile from their arbitration agreement. For example, a case has been made for parties in employment and consumer contracts, who are arguably ignorant of the implications of their decision to oust the jurisdiction of the court over their contract. See Section 2.3 of this chapter for a brief discussion on this debate.

<sup>79</sup> (1991) 3 NWLR PT 180.

<sup>80</sup>*Virtus Chitoo Igbokwe* (n 6) 206-207.

<sup>81</sup> See Section 2.3 of this chapter.

not as straightforward as it may seem. This is because of the many people groups and customs that exist in Nigeria. The number of languages and cultures existing in Nigeria have been estimated to be about five hundred and twenty-one (521).<sup>82</sup> A judge is obviously not expected to be conversant with that many cultures. There is therefore a need to prove the existence and substance of the said custom.<sup>83</sup> In *Joshua Ogunleye v Babatayo Oni*,<sup>84</sup> the Supreme Court held that in every litigation in the High Court where tenets of customary or native law is applied, same must be proven. Merely asserting that it is under native law and custom is not prima facie proof that it is indeed so.

Section 16 of the *Nigeria's Evidence Act 2011*<sup>85</sup> provides that a custom may only be adopted as part of the law governing a particular set of circumstances if it has been judicially noticed or it can be proven to exist by evidence.<sup>86</sup> A judicially noticed fact is one which has become notorious by frequent proof in the courts or has been frequently noticed by the courts. By courts we mean a Superior Court of Record in Nigeria.<sup>87</sup> The burden of proving a custom is on the person alleging its existence.<sup>88</sup> The person has a duty not only to prove the existence of the custom but also to show its relevance to the case at hand.

When a custom cannot be established as judicially noticed, it must be proven as a fact.<sup>89</sup> One way by which the existence or nature of a custom can be proven is by giving in evidence, the opinion of persons who would likely know of its

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<sup>82</sup><http://www.kwintessential.co.uk/resources/global-etiquette/nigeria.html> accessed on 1 April 2014

<sup>83</sup> Section 280 of the 1999 Nigerian Constitution establishes a Customary Court of Appeal for any State that requires one. As we however see in Section 3.5 of Chapter Two of this thesis, many States have failed to exercise this option. This has resulted in a series of erroneous decisions on the position of customary law in Nigeria as Judges of the State High Court lack the requisite knowledge to adjudicate on technical issues of customary law.

<sup>84</sup>(1990) 4 SC 130.

<sup>85</sup> Chapter 112, Laws of the Federation of Nigeria 2011.

<sup>86</sup> See also *Godwin Sasi D. Ogolo v Chief Joseph Tumini Ogolo* (2003) 12 SC 229.

<sup>87</sup> Evidence Act 2011, section 17.

<sup>88</sup> *ibid* section 16(2).

<sup>89</sup> *ibid* section 18(1); see also *Sokwo v Kpongbo* (2008) 2 SCNJ 36.

existence.<sup>90</sup> The Supreme Court has held that they must be “independent” witnesses.<sup>91</sup>

Once the custom further to which the arbitration award was delivered has been established, the court has an added responsibility to ascertain if the said custom passes certain validity tests. According to Obilade,<sup>92</sup> an applicable rule of customary law is not to be enforced by the courts unless it passes the tests. There are three of such tests. The court is expected to confirm that the customary law upon which the award is based;

1. is not repugnant to natural justice, equity and good conscience;
2. is not incompatible either directly or by implication with any law for the time being in force; and
3. is not contrary to public policy.

It is only if the said custom passes these tests that this condition can be said to have been fulfilled.

### **2.3 Agu v Ikewibe: The Validity of Customary Arbitration in the Light of the General Principles of Arbitration.**

A fundamental question which arises in this discourse is whether the customary arbitration process as defined in *Agu v Ikewibe*<sup>93</sup> is in accordance with the general principles of arbitration. This is especially in relation to the condition which gives parties the right to resile from a customary arbitration and/or award.

A number of academics have over the years expressed conflicting opinions. For example, Dr Igbokwe in supporting the decision in *Agu v Ikewibe*<sup>94</sup> argued against the need for a binding agreement or award as a requirement for a valid arbitration. He submitted that “the focus should be on the nature of the decision making process and not necessarily on its binding nature or enforcement.”<sup>95</sup> He argued further that “the

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<sup>90</sup> Evidence Act 2011, sections 73 and 18(2).

<sup>91</sup> *Momodu Olubodun & 4 Ors v Oba Adeyemi Lawal & Anor* (2008) 6-7 SC (Pt.1) 1.

<sup>92</sup> Akintunde Obilade, *The Nigerian legal system* (Spectrum Books Limited 1977) 100.

<sup>93</sup> (1991) 3 NWLR PT 180.

<sup>94</sup> *ibid* 185.

<sup>95</sup> Virtus Chitoo Igbokwe (n 6) 211.

introduction of external instruments of coercion for the enforcement of customary arbitral awards is an invitation to anarchy and a disruption of the peace and good neighbourliness prevalent in these village communities.”<sup>96</sup>

Another commentator and lecturer of law, O.K. Edu, in supporting Igbokwe’s theory opined that parties were free to reject an arbitration proceeding and/or award because arbitration panels are not courts.<sup>97</sup> He argued that the court is the only institution vested with judicial powers by the Constitution. He went further to opine that an award should only be binding if both parties indicate their willingness to be bound by the decision and that it was wrong to suggest that once a party had submitted to customary arbitration, they cannot reject any decision reached. Strangely, this view has been adopted by other Nigerian authors and writers.<sup>98</sup>

On the other side of the coin is the renowned Professor Allot, who has always argued against the existence of customary arbitration in Nigeria and even Ghana.<sup>99</sup> His opinion is based on the fundamental nature of a binding award, which in his opinion is lacking in what is regarded as customary arbitration in Nigerian jurisprudence. In his opinion, what Nigerians refer to as customary arbitration is instead a system of negotiation.<sup>100</sup>

It is submitted that the arguments put forward by both schools of thought lack proper backing, both under the principles of arbitration and under customary law.

For example, those in Dr Igbokwe’s school of thought seem to have overlooked the fundamental nature of a binding agreement or award in general arbitration practice. In the course of this work,<sup>101</sup> we have seen that one of the fundamental features of any

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<sup>96</sup> *ibid* 212.

<sup>97</sup> O.K. Edu, ‘Effects of Customary Arbitral Awards on substantive Litigation: Setting Matters Straight’ 8 <[www.nigerianlawguru.com/articles/customary%20law%20and%20procedure/EFFECT%20OF%20CUSTOMARY%20ARBITRAL%20AWARDS%20ON%20SUBSTANTIVE%20LITIGATION,%20SETTING%20MATTERS%20STRAIGHT.pdf](http://www.nigerianlawguru.com/articles/customary%20law%20and%20procedure/EFFECT%20OF%20CUSTOMARY%20ARBITRAL%20AWARDS%20ON%20SUBSTANTIVE%20LITIGATION,%20SETTING%20MATTERS%20STRAIGHT.pdf)> accessed 14 November 2013.

<sup>98</sup> Gaius Ezejirofor (n 22) 88; A.I Okekeifere, ‘The Recent Odyssey of Customary Law Arbitration and Conciliation in Nigeria’s Apex Courts’ (2002) 5 *Modern Practice Journal of Finance & Investment Law* 101, 104.

<sup>99</sup> For example, see the following Ghanaian cases *Foli v Akese* (1930) 1 WACA 1; *Kwasi v Larbe* (1952) 13 WACA 76.

<sup>100</sup> Antony Allot (n 46) 234.

<sup>101</sup> See Section 3.0 of Chapter Three.

arbitration is a binding agreement and award.<sup>102</sup> In other words, in every arbitration, the focus is not only on the decision making process but also on its binding nature and the enforcement process. It is therefore unacceptable for anyone to suggest by way of a general proposition that any of the parties to an arbitration agreement can of his own volition opt out of an agreement that he had previously acceded to.

On the other hand, unlike what Dr Igbokwe seems to suggest, Dr Oluduro rightly submitted that “allowing parties to resile midstream from proceedings voluntarily constituted by them to resolve their disputes or to reject the award made by such arbitral bodies where it is not favourable, will bring about chaos and confusion. It may lead to a situation where people will start to consider self-help as a better option, especially in this age of monumental congestions and delay in our courts. This practice is indeed alien and foreign to the culture of Nigeria. Every loser of an award will simply resort to disowning the awards as not binding on him, with the result that there will never be an end to such conflicts.”<sup>103</sup> Professor Akanbi also opined that “a losing party may render the award of a hitherto valid customary arbitration unenforceable by claiming that he did not submit to arbitration voluntarily even though he participated all the way and only had an afterthought when he realised he might lose or had already lost.”<sup>104</sup>

Admittedly, there may be exceptional situations which justify the modification of an arbitration agreement.<sup>105</sup> It is however submitted that the validity of these exceptions should not be left to the whims and caprices of parties. Instead, this should be left to the courts to decide within very strict parameters.

It is also submitted that Edu’s opinion that parties are free to reject customary arbitration proceedings and/or awards on the basis that they are not courts, is difficult to comprehend. This submission by the learned academic seems to suggest that only decisions of formal court are recognized as binding in Nigeria. This very general

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<sup>102</sup> Ilias Bantekas (n 73) 12; Nigel Blackaby et al (n 74) 14.

<sup>103</sup> Olubayo Oluduro, ‘Customary Arbitration in Nigeria: Developments and Prospects’ (2011) 19(2) *Journal of International and Comparative Law* 307, 324.

<sup>104</sup> M.M. Akanbi, ‘Voluntarily Submission under Customary Arbitration in Nigeria’ (2008) 1(1) *Nigerian Journal of Public Law* 62, 72.

<sup>105</sup> Situations involving fraud or bias are good examples.

statement is misleading as it is clear that Nigerian law recognizes the idea and practice of arbitration.<sup>106</sup> In fact, Nigerian lawmakers have put in place an Arbitration and Conciliation Act, to govern issues relating to arbitration in Nigeria, which the courts have severally held to be binding.<sup>107</sup> *Section 5 of this Act* particularly mandates the court to grant an application to stay any court proceedings brought in breach of an arbitration agreement. *Section 34 of the same Act* expressly ousts the jurisdiction of the Court in any matter related to arbitration. It is therefore clear that the law and by extension the courts recognise the jurisdiction, validity and binding nature of arbitration agreements. This is especially so when one considers the fact that arbitration powers do not fall under the judicial powers bestowed upon the court by the Constitution of Nigeria.<sup>108</sup>

Furthermore, the doctrine of party autonomy allows parties the freedom “...to construct their contractual relationship in the way they see fit”.<sup>109</sup> A pre-dispute arbitration agreement is usually one of the terms of a contract which parties have a right to construct in whatever way they deem fit. The arbitration agreement actually derives its life from the head contract and is usually a term of the said contract. However, like a new born baby at birth, the arbitration agreement acquires a life of its own independent from its head contract.<sup>110</sup>

In trying to justify the importance of a binding contract in Nigeria, the learned Nigerian writer, Professor I.E Sagay in his popularly acclaimed book, opined that “to ensure order, peace and security and the smooth and efficient operation of commerce, industry and economy, the law recognizes the need for the satisfaction of reasonable and well-founded expectations created by promises and agreement...Trade and commerce (and even life in general) would be chaotic if not impossible if the law

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<sup>106</sup>*The Owners of the M.V. Lupev V. Nig. Overseas Chartering & Shipping Ltd* (2003) 10 SCM 71; *K.S.U.D.B. V. Fanz Construction. Co Ltd* (1990) 6 SC 103.

<sup>107</sup> See Section 3.1 – 3.6 of Chapter Four for a discussion on this.

<sup>108</sup> Section 6 of the 1999 Nigerian Constitution.

<sup>109</sup> Sayed Abdulhay, *Corruption in International trade and Commercial Arbitration* (Kluwer Law International 2004) 159.

<sup>110</sup> Admittedly, this point which relates to the separability of an arbitration agreement, raises a number of issues. In order to avoid duplicity of arguments in the thesis, the writer has decided to address these issues in later parts of this thesis. See Section 3.2 of Chapter Six and Section 2.1.2 of Chapter Seven.

permitted a promisor to break his promise..." (Phrase in bracket is mine).<sup>111</sup> The learned author went on to categorise contract law in Nigeria into two; formal contracts and simple contracts. While formal contracts are expected to be in writing, simple contracts do not necessarily need to be in writing. Simple contracts could be entered into orally.<sup>112</sup> It is submitted that contracts made under customary law are good examples of simple contracts as they are usually made orally.

One should point out that since customary arbitration agreements are reached after the dispute has arisen; arguments relating to the validity and rationality behind pre-dispute agreements are not relevant here.<sup>113</sup> As we have seen in our previous discussion on the customary arbitration process, the respondent has a right to reject the process already initiated by the claimant. If this happens, customary law mandates both parties to jointly decide on the method by which their dispute would be resolved.

It is therefore clear that contrary to what Edu sought to argue international and even Nigerian law is not averse to a just agreement by parties to resolve their personal disputes outside the court room.<sup>114</sup> It is also clear that except in very exceptional circumstances, it is contrary to the principles of contract law (and very unfair to the other party) for a party to a contractual relationship and by extension to the arbitration agreement clause resident therein, to claim not to be bound to a term that he had hitherto agreed to. Dr Ezike rightly submitted that "if a party voluntarily entered into

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<sup>111</sup> Itse E Sagay, *Nigerian law of Contract* (Sweet and Maxwell 1985) 1.

<sup>112</sup> Oral contracts are also known as Parol Contracts.

<sup>113</sup> While some have opined that parties to a pre-dispute arbitration agreement lack the foresight to determine the method of resolving a dispute that has not arisen, others have argued that many times, a category of parties cannot have been said to have voluntarily given their much needed consent to their arbitration agreement. For instance, employees and consumers arguably have little or no option but to execute a pre-dispute arbitration agreement. In fact, it has been argued that a pre-dispute arbitration agreement in an employment and consumer contract is a means by which large corporations suppress the constitutional rights of their employees and consumers to court. Unlike employers who are usually well informed of what the pre-dispute arbitration agreement may entail, employees often do not realize the implications of opting out of their access to court. Proponents of this argument have opined that this more or less takes away the consent and voluntariness expected from arbitration agreements. For a more detailed discussion of this issue, see Ilias Bantekas, *An Introduction to International Arbitration* (Cambridge University Press 2015) 254-255; S Bennets, 'The Proposed Arbitration Fairness Act; Problems and alternatives' (2012) *Dispute Resolution Journal* 34; Letter in Support of the Arbitration Fairness Act, H.R. 1020 *Fair Arbitration Now* (2 March 2009) <[www.fairarbitrationnow.org/content/letter-support-arbitration-fairness-act-hr-1020](http://www.fairarbitrationnow.org/content/letter-support-arbitration-fairness-act-hr-1020)> accessed 6 April 2014.

<sup>114</sup> *Okparaji v Ohanu* (1999) 9 NWLR (Pt 618), 290.

an agreement with another to submit a dispute for settlement by a particular person and accept the decision of such a tribunal, he has a moral and social obligation not to frustrate the powers by withdrawing midstream or rejecting the decision when it does not favour him".<sup>115</sup>

Such an unsatisfied party is however not left without an option under Nigerian law. By virtue of the provisions of the Constitution, any party who is dissatisfied with an award has the option of approaching the courts to express his grievance.<sup>116</sup> It is submitted that an aggrieved party could for example argue that the award was not in line with the applicable customary law or trade practice of the parties. He could also raise issues like bias on the part of the arbitrators, mistake on his part or fraud committed by the other party (in relation to the arbitration agreement).<sup>117</sup>

An aggrieved party also has the option of challenging the other party's attempt to enforce the award.<sup>118</sup> It should be recalled that for a party to be able to enforce his award, he still needs to approach the superior courts for an enforcement order. An aggrieved party could at this point argue that there was no voluntary submission by the parties to the jurisdiction of the arbitrator, without which the arbitration is void. He could also argue that even though he participated in the proceedings, there was no intention to be bound by the decision of the "arbitrators". In other words, all he needs to do is adduce evidence to show that proceedings were intended as a mediation or reconciliation process rather than an arbitration proceeding.<sup>119</sup>

On the other side of the argument is the late Professor Allot, who held tenaciously to his view that Nigeria could not have had a system of customary arbitration. Instead

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<sup>115</sup> Edwin Obinna Ezike, 'Halting the misconception relating to Customary Arbitration in Nigeria' (2013) *International Arbitration Law Review* 1, 6.

<sup>116</sup> Section 36 of the 1999 Nigerian Constitution.

<sup>117</sup> The strength of these defences will obviously be up to the courts to decide.

<sup>118</sup> Andrew Chukwuemerie, *Studies and Materials in International Commercial Arbitration* (Law house Books 2002) 109.

<sup>119</sup> *Ekwueme v Zakari* (1972) 2 ECSR 631.



he believed that what Nigeria had was a system of negotiation. This position as Judith Rapu rightly noted was based on the lack of a visible method of enforcement.<sup>120</sup>

It is respectfully submitted that Professor Allot's opinion was somewhat uninformed and therefore unacceptable.<sup>121</sup> This is understandable in view of the fact that he was neither an indigene nor a resident of any of these traditional societies. This made him downplay the influence of tradition and superstition on the dispute resolution system in pre-colonial Nigeria, by adopting the view that parties had an unrestricted right to resile from their agreement. It is evident from our discussions of Nigerian case law and also academic discussions that this is definitely not an area of controversy.<sup>122</sup>

Oluduro in response to Allot rightly submitted that, "Equating customary arbitration with mere negotiation for settlement is untenable...it is common for established native institutions, groups or bodies, or even non-established groups of persons, to be chosen by native disputants to adjudicate over such difference with a mandate to give binding decisions..."<sup>123</sup> Customary arbitration is very much different from negotiation, which usually lacks the mutual consent of parties involved in the dispute and to which either of the disputing parties can withdraw at any given time from the negotiation process.<sup>124</sup> As Nwakobi concluded, "it is very wrong for Allot to state that under the customary law, what is termed customary arbitration should rightly be termed mere negotiation for settlement. In Nigeria, customary arbitration exists independently of mere negotiation for settlement..."<sup>125</sup>

Furthermore, customary law demands that elders (which as we have previously discussed were usually the arbitrators) be obeyed and respected at all times. There is

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<sup>120</sup> Judith Fumnanya Rapu, 'Alternative Dispute Resolution of Indigenous African Disputes: An irrelevant Myth or Catalyst for Modern Global Relations?' (2012) Nigerian Institute of Advanced legal Studies Journal 271, 284.

<sup>121</sup> F.J.Oniekoro, "Customary Law Arbitration and Oath Taking; The Crisis of Validity", (2005) 1(2) Ikeja Bar Journal 53.

<sup>122</sup> In addition, we will see in Chapter Six that the Ghanaian legislature has since incorporated customary arbitration into its newly enacted dispute resolution framework - Ghanaian ADR Act 2010.

<sup>123</sup> Olubayo Oluduro, "Customary Arbitration in Nigeria: Developments and Prospects" (2011) 19(2) Journal of International and Comparative Law. 307, 310.

<sup>124</sup> *Ekwueme v Zakari* (1972) 2 ECSR 631.

<sup>125</sup> G.C. Nwakobi, *The law and Practice of Commercial Arbitration in Nigeria* (Iyke Ventures Production 2004) 14. This distinction was discussed in more detail in Section 1.0 of Chapter Two of this thesis.

a Yoruba adage which when interpreted means that an “elder is always right”. This as we have previously discussed was as a result of the wisdom and respect accorded to old age. It was believed that any individual who disobeyed or disrespected an elder was calling the wrath of the gods upon himself. The disobedient party also risked being ostracised by the community.<sup>126</sup> A combination of the aforementioned was the highest form of punishment available in a private dispute. Parties therefore obeyed an award not necessarily because they wanted to, but because there was a law (customary law) that mandated them to.<sup>127</sup> In other words, obedience was hinged on factors beyond the desire to maintain neighbourliness and societal peace.

The colonisation of Nigeria, the influx of “foreign” religions (Christianity and Islam predominantly) and the advent of civilization has however whittled down the influence of the local traditional religion and custom in Nigeria.<sup>128</sup> Unlike the local gods and religion that dispensed instant justice in public glare, the God(s) behind these “foreign” religions are perceived to be more merciful. Consequently, people now have no qualms about swearing falsely in the name of God. Furthermore, the reverence associated with old age is gradually being demystified. The subjugation of customary law by the English styled laws in Nigeria has indeed stunted the growth and development of customary law in Nigeria.<sup>129</sup> The unwritten nature of customary law has definitely not helped matters. In an increasingly secular and developing world, there is a need to codify and develop a system of customary law with legs that can stand without the aid of religion and mere belief.

It can also be argued that those in Professor Allot’s school of thought have failed to take into consideration all the steps that make up the modern customary arbitration process before reaching their conclusion about the non-existence of the practice in Nigeria. Their opinion is based on the erroneous belief that the customary arbitration process ends after the arbitrator’s award has been delivered, at which stage parties arguably still have the legal right to resile. We have however seen under our

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<sup>126</sup> Nonso Okereafiojeke (n 28) 155.

<sup>127</sup> Andrew Chukwuemerie (n 68) 143.

<sup>128</sup> *ibid.*

<sup>129</sup> Abdulmumini A. Oba (n 39) 140.

discussion on the general principles governing arbitration that enforcement is a key and final step in any arbitration process especially where the losing party refuses to abide by the award.<sup>130</sup> We have also seen that under the law governing customary arbitration, a winning party has the right to approach the court for an enforcement order where the other party fails to abide by the award. The winning party would not only have to prove the conditions prescribed in *Agu v Ikewibe*,<sup>131</sup> he would also have to prove that the customs used in deciding the dispute are not contrary to the repugnancy doctrine or any relevant law in force. We know that if this is successfully done, the court issues an enforcement order validating the award as a judgement of the court. At this point, it becomes binding on the parties and any attempt to resile will not only be undermining the arbitration award but also the jurisdiction of the court. Simply put, since the arbitration process can be said to continue until it has been enforced, the customary arbitration process in Nigeria can only be said to be complete after the court has given a validation or enforcement order of the customary arbitration award. At this point, the award has the backing of the court and must be obeyed and treated like every other court order.<sup>132</sup>

In reality therefore, parties cannot resile when the arbitral process is truly concluded. This argument admittedly leaves the question of what happens if a party resiles in the middle of the proceedings unanswered. Strictly speaking, it would seem as if parties as at the time of *Agu v Ikewibe*<sup>133</sup> still had a right to resile in the middle of the proceedings. This again raises issues as to the validity of the customary process in the light of established principles of arbitration. Furthermore, the issue of fairness becomes pertinent in view of the time and resources already expended on the failed process. In recognition of this problem, the Nigerian courts have in recent decisions attempted to address this lacuna.<sup>134</sup>

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<sup>130</sup> Nigel Blackaby et al, (n 74) 14.

<sup>131</sup> (1991) 3 NWLR PT 180.

<sup>132</sup> *Okparaji v Ohanu* (1999) 9 NWLR (Pt 618) 280.

<sup>133</sup> (1991) 3 NWLR PT 180.

<sup>134</sup> We address this problem further on in this work.

In tying up and concluding our discussions on the validity of the definition of customary law in *Agu v Ikwibe*,<sup>135</sup> it is submitted that in as much as parties were (and still are) bound by the award of their arbitrators under customary law, the decision of the Supreme court in *Agu v Ikwibe*,<sup>136</sup> which allowed parties to a customary arbitration to resile if they chose to, is an important factor which cannot be glossed over. As Tochukwu Maduka rightly noted,<sup>137</sup> this decision is definitely contrary to the accepted principles of arbitration and so therefore disqualifies the customary arbitration practice defined in *Agu v Ikwibe*<sup>138</sup> from attaining the full status of arbitration. It is submitted that it could at best be referred to as a quasi-arbitration practice.

## **2.4 Recent Developments in the Law Governing Customary Arbitration in Nigeria.**

In the course of this work, we have seen that the case of *Agu v Ikwibe*,<sup>139</sup> rather than resolve the controversy surrounding the existence and validity of customary arbitration, gave birth to a new and more intense controversy, especially in respect to the condition which enabled a party to resile from a customary arbitral process.<sup>140</sup>

The Supreme Court in its more recent decisions however seems to have deviated from the principle in *Agu v Ikwibe*.<sup>141</sup> For example, in the case of *Igwego v Ezeugo*,<sup>142</sup> the Supreme Court “omitted” the controversial condition which gives parties the right to resile. The dispute in this case was over a parcel of land known as Ezeugo land situate at Umueze family of Adazi-Ani and clearly shown on the Plan E/GA.1054/75. The dispute was mutually referred to a traditional institution known as the Peace Committee for arbitration. The arbitrators’ decision, which was against the appellant, was upheld by both the High Court and the Court of the Appeal, subsequent upon

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<sup>135</sup> (1991) 3 NWLR PT 180.

<sup>136</sup> *ibid*.

<sup>137</sup> Tochukwu Maduka, ‘The Binding Effect of a Customary Arbitration Award: Exorcizing the Ghost of *Agu v Ikwibe*’ (2014) 58(2) *Journal of African Law* 328, 350.

<sup>138</sup> (1991) 3 NWLR PT 180.

<sup>139</sup> *Ibid*.

<sup>140</sup> The Court of Appeal in a series of decisions followed *Agu v Ikwibe*. See *Ebere v Onyenge* (2000) 2 NWLR (Pt 643) 62 and *Obioha v Akukwe* (2002) 5 NWLR (Pt 658) 699 among others.

<sup>141</sup> (1991) 3 NWLR PT 180.

<sup>142</sup> (1992) 6 NWLR (Pt 249) 561.

which he appealed again to the Supreme Court claiming that the decision of the Peace Committee could not stand as a ground for a plea of estoppel per rem Judicatam.

Honourable Justice Nnaemeka-Agu in support of the majority decision of the court held that “where parties to a dispute voluntarily submit their dispute to a customary body of persons such as the Peace Committee in this case for adjudication and agree to be bound by the decision of the body on the issues in controversy between them, if the body goes into the matter, hears both sides and reaches a decision, the law takes the view that the parties to the dispute had chosen their own forum rather than the courts. None of the parties will be allowed later to back out of the decision if it does not favour him. He will be bound thereby and the successful party can plead the decision as estoppel”.

It should be observed that the Supreme Court in *Igwego's* case limited its pronouncements to the validity of an arbitration award and not the agreement itself. It would seem that the Supreme Court was only willing to enforce the arbitration agreement if the parties successfully went through the customary arbitration proceeding. It however did not address a situation where parties enter into a customary arbitration agreement and one of the parties refuses to submit to the arbitration proceeding. Was a party allowed to resile from his arbitration agreement by refusing to submit to the customary arbitration panel or could the court give an order mandating him to submit to the customary arbitration tribunal by virtue of his arbitration agreement?

Without expressly addressing this question, the Supreme Court in *Okparaji v Ohanu*<sup>143</sup> somewhat expressed its willingness to enforce a customary arbitration agreement if given the opportunity to do so. This case was a claim for customary declaration of title to land. The court in this case held that “Nigerian law recognizes and accepts the validity and binding nature of arbitration under customary law, if it is established;

1. that both parties submitted to the arbitration;
2. that the parties accepted the terms of the arbitration and;

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<sup>143</sup> (1999) 9 NWLR (Pt 618) 290.

3. that they agreed to be bound by the decision of the arbitrators”.

This decision obviously takes care of a situation where a party to a customary arbitration agreement suddenly becomes uncooperative and refuses to submit to an arbitrator’s jurisdiction and/or attend arbitration proceedings. Even though this has not been tested yet under Nigerian law, it seems safe to submit that going by the decision of the court in the *Okparaji v Ohanu*,<sup>144</sup> a party to an arbitration agreement can successfully approach the court to obtain an order mandating an uncooperative party to participate in customary arbitration proceedings if he successfully shows the existence of the conditions stated in the case.

The Supreme Court however seemed to take a step backwards in the case of *Onyege v Ebere*.<sup>145</sup> This case was a claim for Customary right of Occupancy over a piece of land called Egbelu Ulogor. According to the respondents, their ancestors had pledged the land in question to the appellants for four hundred (400) manilas. For many years, the pledge went unredeemed until the respondent’s father assumed the position of the head of the family and attempted to pay back the debt. The appellant refused the respondent’s claim of ownership and so parties referred the dispute to the chief priest of the local god for arbitration. Both parties were given an opportunity to present their case after which parties and their arbitrators agreed to swear an oath. While the respondent willing took oath before the local god, the appellant refused. The arbitrator subsequently gave the appellant eight (8) days to submit an acceptable god or juju for oath swearing. The appellant did this and the respondent swore an oath again and the waiting period began.<sup>146</sup> The respondent survived the one (1) year waiting period after which he moved to take over possession of the land. The appellant refused this attempt and so the respondent approached the court. Justice Nikki Tobi held among other things that the Supreme Court “recognizes oath taking as a valid process under customary law arbitration”. He went on to hold that once parties adopt it as the process

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<sup>144</sup>Ibid.

<sup>145</sup> (2004) 6 SCNJ.

<sup>146</sup> We mentioned earlier that there was always a waiting period after the oath swearing. This waiting period was to give room for the local god to strike the lying party.

of resolving their disputes, it was no longer open to any of them to resile from the arbitration proceedings (and by extension the agreement).

This decision is definitely a step back from the decision in *Okparaji v Ohanu*.<sup>147</sup> A mischievous party may decide to argue that this decision allows for parties who are not sworn on oath, to resile from their arbitration proceedings and/or award if they choose to. The *Onyege v Ebere*<sup>148</sup> decision takes us back to the problem in the *Igwego v Ezeugo*<sup>149</sup> case because both decisions seem to hold that an arbitration agreement is only enforceable when a dispute has been submitted to an arbitral tribunal. They however differ in respect to how far the proceedings must have progressed before the agreement can be enforced. While *Onyege v Ebere*<sup>150</sup> holds that parties cannot resile once they swear on oath (which is usually at the beginning), *Igwego v Ezeugo*<sup>151</sup> seems to suggest that they can still resile until an award has been given.

The decision of the Supreme Court in *Agala v Okusin*<sup>152</sup> does not necessarily help matters. The dispute in this case had to do with a disagreement over the headship of the Okusin compound. It was the contention of the respondents that the appellant was not a chief of the Okusin compound and so could not be made the paramount head of the Okusin compound under the Kalabari native law and custom.<sup>153</sup> The dispute was subsequently referred to arbitrators who ruled against the respondent. The respondents attempted to institute another arbitration proceeding, which was rejected by the appellant. This resulted in the present court action. The appellants in their amended statement of defence denied the respondents' allegations, adding that at the initial arbitration, both parties paid the arbitration fees and were sworn on oath under pain of death. They therefore relied on the defence of waiver, estoppel per rem judicatam and estoppel by conduct.

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<sup>147</sup> (1999) 9 NWLR (Pt 618) 290.

<sup>148</sup> (2004) 6 SCNJ.

<sup>149</sup> (1992) 7 SCNJ 284.

<sup>150</sup> (2004) 6 SCNJ.

<sup>151</sup> (1992) 7 SCNJ 284.

<sup>152</sup> (2010) 10 NWLR (Pt 1202) 412

<sup>153</sup> Kalabari is a tribe in Nigeria.

*Honourable Justice Ogbuagu* in his judgement submitted that going by the provisions of *Section 6(1) & (5) of both the 1979 and 1999 Constitution*, it is the courts and not non judicial bodies that have the right to exercise judicial powers in Nigeria. He went further to hold that parties have a choice to either "...follow the normal channel for determination of any controversy through the machinery of the courts or to submit the matter voluntarily to a non-judicial body for a decision. If they choose the former; the decision of a court of competent jurisdiction on such a matter would constitute estoppel per rem judicatam. Where they choose the latter and there is an intervention by a non-judicial body, then the court ought to be satisfied that a number of conditions precedent were satisfied ..."<sup>154</sup>

These conditions are:

1. There must have been a voluntary submission of the dispute by the parties to the non-judicial body;
2. The parties must have agreed to take the decision of the non-judicial body as final;
3. The decision must be in accordance with the custom of the people or of their trade or business; and
4. The arbitrators must have reached a decision and published their award.

The learned jurist went ahead to state that "parties to disputes must remember that such persons or bodies ... though highly placed and respected, are not judicial bodies. Before their decision on any matter in dispute between parties can be relied upon as estoppel, all the above requirements of a binding customary arbitration must be shown to have been observed".<sup>155</sup>

It is clear from the foregoing cases that the decision of the court in *Agu v Ikewibe*<sup>156</sup> is no longer good law. It is also clear that there is no controversy on the status of a customary arbitration agreement once an award has been delivered. One is however left in doubt as to the validity of a customary arbitration agreement before the

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<sup>154</sup>(2010) 10 NWLR (PT 1202) 412, 47-48.

<sup>155</sup> Ibid.

<sup>156</sup> (1991) 3 NWLR PT 180.



proceedings have begun. The question then arises as to how we may be able to reconcile the decision of the court in *Okparaji v Ohanu*<sup>157</sup> with *Agala v Okusin*.<sup>158</sup>

The Supreme Court in *National Electric Power Authority v Mrs P.O Onah and 7ors*<sup>159</sup> held that “where there is no discernable ratio decidendi common to the decisions of a superior court and the court has handed down conflicting decisions, the lower court or court of co-ordinate jurisdiction is free to choose between the decisions which appear to it to be correct. “

Going by this, it is clear that until such a time as when we have a decision which consolidates *Okparaji v Ohanu*<sup>160</sup> and *Agala v Okusin*<sup>161</sup> into one, both decisions stand and the lower courts have a discretion to choose which of the decision they believe is right and will achieve the ends of justice in a particular matter. It is suggested that the better and general position of the law should be that parties are bound by their oral agreement to arbitrate. This suggestion is to encourage certainty and prevent chaos.<sup>162</sup> A party who however believes he has justifiable reasons to resile from his arbitration agreement may be allowed to do so further to an order of the court only.

In concluding this part of the chapter, it is submitted that going by the decisions of the court in *Igwego v Ezeugo*,<sup>163</sup> *Okparaji v Ohanu*<sup>164</sup> and *Agala v Okusin*,<sup>165</sup> the customary quasi arbitration practice in Nigeria can be said to have evolved from a quasi-arbitration practice into a full arbitration practice. A decision by the Supreme Court consolidating these decisions will however be helpful in dispelling any remaining doubts.

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<sup>157</sup> (1999) 9 NWLR (Pt 618) 290.

<sup>158</sup> (2010) 10 NWLR (Pt 1202) 412.

<sup>159</sup> (1997) 1 SCNJ 220.

<sup>160</sup> (1999) 9 NWLR (Pt 618) 290.

<sup>161</sup> (2010) 10 NWLR (Pt 1202) 412.

<sup>162</sup> Olubayo Oluduro (n 103) 324; Mustapha Akanbi (n 104) 72

<sup>163</sup> (1992) 7 SCNJ 284.

<sup>164</sup> (1999) 9 NWLR (Pt 618) 290.

<sup>165</sup> (2010) 10 NWLR (Pt 1202) 412.

### 3.0 CUSTOMARY ARBITRATION: A CASE FOR REFORMS

Notwithstanding the many controversies surrounding the practice of customary arbitration in Nigeria, it is evident that this uncodified practice has always been a fundamental part of the dispute resolution system in Nigeria. The case of *Agala v Okusin*<sup>166</sup> shows that customary arbitration still remains an existing, successful and legal binding method of resolving disputes in Nigeria.<sup>167</sup>

It has grown from a traditional and unregulated practice to one under the guidance of Nigerian courts. However, customary arbitration agreements still remain largely unwritten and therefore beyond the purview of the governing arbitration framework in Nigeria, the Nigerian Arbitration and Conciliation Act 2004. As discussed in Chapter Four, *Section 1 of the said Act*<sup>168</sup> provides that all arbitration agreements be in writing. Unfortunately, customary arbitration agreements are usually oral and this explains why the Supreme Court has severally required that the existence of a customary arbitration agreement be proven through evidence.<sup>169</sup>

This omission is sad because this pre-existing practice is indigenous and therefore well suited to the peculiarities of Nigeria as a nation. As Professor Andrew Chukwuemerie rightly noted, “it would be suicidal in a sense to attempt stifling customary law arbitration or to foist alien rules upon it without such rules going through the people’s daily usage and culture to first of all gain acceptance”.<sup>170</sup> Unfortunately, for reasons best known to them, Nigerian lawmakers chose to enact a replica of the UNCITRAL model law in Nigeria without taking into consideration existing practices. It is submitted that this failure to adapt the law to the cultural and political idiosyncrasies of the country has inhibited the growth and practice of a very functional domestic arbitration in Nigeria.<sup>171</sup>

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<sup>166</sup>*Agala v Okusin* (2010) 10 NWLR (PT 1202) 412.

<sup>167</sup> See also *Okoye v Obiaso* (2010) 8 NWLR (Pt. 1195) 145 at 171-172; *Achor v. Adejoh* (2010) 6 NWLR (Pt.1191) 537 at 569; *Okereke v. Nwanko* (2003) 9 NWLR (Pt. 826) 592; *Egesimbe v. Onwuzurike* (2002) 15 NWLR (pt. 791) 446.

<sup>168</sup>Nigerian Arbitration and Conciliation Act 2004.

<sup>169</sup> *ibid.*

<sup>170</sup> Andrew Chukwuemerie, ‘Salient Issues in the Law and Practice of Arbitration in Nigeria’ (2006) 14 *African Journal of International and Comparative Law* 1, 6.

<sup>171</sup> We discussed the unsuitability of the Act in Section 5.0 of Chapter four.

As we will see in Chapter Six, Ghana a country with a similar cultural, legal and even colonial history as Nigeria, recently incorporated her successful and generally accepted customary arbitration practice into the country's alternative dispute resolution statutory framework.<sup>172</sup> As we will also see, the said framework was introduced in response to challenges encountered in the administration of justice at the Ghanaian courts.<sup>173</sup> For example, Ghana like Nigeria also has overburdened courts and there was need to provide viable alternatives.<sup>174</sup>

To aid the development of a successful domestic arbitration practice in Nigeria and by extension provide a viable alternative to litigation, it is submitted that there is need to put into place an Arbitration Act that provides for all strata of the Nigerian society: the young and old, the rich and poor, the educated and uneducated. There is also a need to provide a framework that creates a balance between the idiosyncrasies of the Nigerian nation and the basic principles of arbitration. Rather than blindly adopting a model law, a country has a duty to ascertain its suitability and make adjustments as necessary. A cue should be taken from the United Kingdom which only adopted suitable parts of the Model law into the English Arbitration Act 1996.<sup>175</sup>

Nigeria (and indeed Africa) needs to get her act together as her long desired and awaited change can only come from within. Stakeholders need to address these internal problems rather than attempting cosmetic changes. Adopting a model framework does not necessarily guarantee or foster a development of Nigeria's arbitration practice. Professor Abiodun Alao during his recently delivered Inaugural lecture at Kings College rightly stated that "...Africa should take over the process of controlling its own narratives. Dogmatic acceptance of narratives from outside is not only banal and devoid of any logical thinking but actually wrong and potentially

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<sup>172</sup> Ghanaian ADR 2010.

<sup>173</sup> While we commend Ghana for taking this initiative, the approach is not without its criticisms. See Section 1.1.2 of Chapter Six.

<sup>174</sup> Kwadwo Sarkodie, 'Arbitration in Ghana-The Alternative Dispute Resolution Act 2010' 1<[www.mayerbrown.com/files/Publication/5ee1223112954559816789d93cdf2a06/Presentation/PublicationAttachment/91e048fe-67d44e3f9d108bbf9861e753/ArbitrationGhana\\_Sarkodie.pdf](http://www.mayerbrown.com/files/Publication/5ee1223112954559816789d93cdf2a06/Presentation/PublicationAttachment/91e048fe-67d44e3f9d108bbf9861e753/ArbitrationGhana_Sarkodie.pdf)> accessed 28 January 2015; Paul kirgis, 'Customary Arbitration in an Evolving Africa' <[www.indisputably.org/?p=2592](http://www.indisputably.org/?p=2592)> accessed 28 January 2015, <<http://jtighana.org/new/actdetails.php?id=21>> accessed 15 January 2015.

<sup>175</sup> See Section 3.1 of Chapter Six.

harmfully".<sup>176</sup> Efforts should be made towards developing and consolidating local and existing frameworks before attempting to import new systems.

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<sup>176</sup> Abiodun Alao, 'Africa: A Voice To Be Heard, Not A Problem To be Solved' (Inaugural Lecture delivered at Kings College, London on April 26 2016) <  
<http://blogs.premiumtimesng.com/2016/04/27/172515>> accessed 30 April 2016.

**CHAPTER SIX**  
**A DOMESTIC ARBITRATION ANALYSIS OF THE GHANAIAAN ALTERNATIVE  
DISPUTE RESOLUTION ACT 2010, THE UNCITRAL MODEL LAW 2006, THE  
ENGLISH ARBITRATION ACT 1996 AND THE UNIFORM ACT ON  
ARBITRATION 1999**

**INTRODUCTION**

In Chapter Four, we described the domestic arbitration framework and practice in Nigeria. More importantly, we examined some of the controversial issues arising from the framework, which have in turn affected the development of arbitration in Nigeria. We concluded that chapter by making a case for reforms.

Apart from the shortcomings of the existing arbitration framework in Nigeria as discussed in Chapter Four of this thesis, it is argued that the domestic (and even the international) arbitration framework in Nigeria is also outdated. In the almost thirty years in which the Nigerian framework has been in existence, a number of beneficial changes, trends and developments have occurred within the sphere of arbitration, which have proven to be very useful in the practice of arbitration in other jurisdictions and from which the framework and practice in Nigeria would benefit immensely. For example, in order to properly tackle the issue of congestion plaguing its courts, the Ghanaian government recently replaced its 1961 Arbitration Act with a framework that amongst other things, incorporates its deeply rooted customary arbitration framework into its new statutory framework. Furthermore, the UNCITRAL Model Law which the Nigerian arbitration framework is modelled after has since been revised to suit the demands of commercial practice. For these and other reasons, there is a need to revisit the Nigerian Arbitration framework.

In our quest to suggest a new and practical framework for Nigeria, this chapter examines the domestic aspects of four more developed but relevant arbitration frameworks: the Ghanaian Alternative Dispute Resolution Act 2010, the UNCITRAL Model Law 2006, the English Arbitration Act 1996 and the Uniform Act on Arbitration 1999. This discussion provides useful insight into developments that have occurred

within the field of arbitration and from which this thesis, indeed the Nigerian arbitration practice in general, can draw.

This chapter is divided into four parts. In the first part, we examine the new arbitration framework in Ghana as contained in its Alternative Dispute Resolution Act 2010 (the ADR Act). Specifically, we justify this selection and provide a brief background of this Act. In the process of critically analysing this framework, we also distinguish between the Ghanaian and Nigerian arbitration frameworks. Among the many other provisions contained in the ADR Act, we specifically acknowledge the bold and pioneering efforts of the Ghanaian legislature in incorporating customary arbitration into its statutory framework. Hitherto, customary arbitration in Ghana and even Africa was regulated by case and customary law.

Notwithstanding the fact that the Ghanaian ADR Act recognizes and incorporates customary arbitration into statute, it in a way differentiates customary arbitration from the other types of arbitration<sup>1</sup> by providing for both practices in separate parts of the Act. In other words, while customary arbitration is provided for in Part Three of the Act, arbitration (in the general sense in which it is known) is provided for in Part One of the Act. Interestingly, both parts of the Act have similar provisions and so this writer questions the idea behind separating these two parts of the Act. A number of controversial issues arising from the ADR Act are also dealt with in this part.

In Chapter Four, we pointed out that the Nigerian Arbitration and Conciliation Act is largely modelled after the 1985 version of the UNCITRAL Model Law. For this reason, we will not repeat the discussion on the provisions of the UNCITRAL Model Law. Instead in the second part of this chapter, we critically analyse the relevant improvements that have been made to the 2006 version of the Model Law. This also provides a suitable background for the third part of this chapter.

The third part of this chapter involves a comparative analysis of the Nigerian, Ghanaian, UNCITRAL and the English arbitration frameworks. It highlights the differences that exist between these frameworks, especially as they relate to domestic

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<sup>1</sup> Here we refer to arbitration in the traditional sense in which it is known all over the world. This includes domestic and international arbitration.

arbitration. In the course of this chapter, we submit that the English Arbitration Act provides the most detailed and practical arbitration framework of all the frameworks under consideration including the UNCITRAL Model Law.

In the final part of this chapter, we introduce the Organization for the Harmonization of Business Law in Africa Treaty (“OHADA treaty”). This treaty was conceived to encourage the development of commercial relations in Africa as well as encourage legal certainty through the unification of business laws in Africa.<sup>2</sup> We note that despite the best intentions of the promoters of this treaty, only seventeen Francophone countries have signed the treaty till date. One reason which we identified in this thesis is the fact that the OHADA treaty bases its framework on Civil law, a law incompatible with the legal system in many African countries. For example, Nigeria and Ghana amongst others, by virtue of their colonial history, practise common law. We conclude this chapter by critically analysing the Uniform Act on Arbitration 1999 (the common arbitration framework for the OHADA member States) as against the other arbitration frameworks which we have discussed in this thesis.

## **1.0 THE ARBITRATION PRACTICE IN GHANA**

### **1.1 Background**

Nigeria and Ghana share a deeply rooted background dating back to the pre-colonial era. Not only were the people of what is now known as Nigeria and Ghana involved in trade relations among themselves, they also shared similar cultural beliefs and practices, a good example of which is the customary arbitration practice.

Like Nigeria, Ghana is divided along ethnic lines. Furthermore, both countries are former colonies and products of the British government’s occupation of West Africa. As a result of the common geographical and colonial history of both countries, they also share a similar legal background. Not only does Common Law play a major part of the laws in these two countries, like many other African countries, some of the pre-

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<sup>2</sup> See generally the Preamble of the OHADA Treaty.

existing customary laws and practices of both African countries remain a part of their legal framework.<sup>3</sup> One of these local practices is the customary arbitration practice.

Customary arbitration has existed long before the colonisation of both Nigeria and Ghana.<sup>4</sup> Asouzu rightly noted that “every society must of necessity have a means of resolving conflicts among its constituents. The pre-colonial African communities were no exception. Before the conquest or annexation and consequent colonization of most African societies by alien powers, these societies had their informal dispute resolution methods, which they retained.”<sup>5</sup> As we mentioned in Chapter Five of this thesis, customary arbitration was a predominant method of resolving disputes in many African communities. As far back as 1932, the courts had recognized this method of dispute resolution in Ghana. For example, in the Ghanaian case of *Assampong v Amuaku and ors*,<sup>6</sup> the West African Court of Appeal held that where matters in dispute between parties are by mutual consent investigated by arbitrators at a meeting held in accordance with native law and custom, and a decision is given, it is binding on the parties and the court will enforce such a decision.<sup>7</sup>

In another Ghanaian case, *Opanin Asong Kwasi & ors v Joseph Richard Obuadang Larbi*,<sup>8</sup> this principle was extended to include a situation in which parties submitted their dispute to customary arbitration and one of the parties resiled in the middle of the proceedings. In such situations, the courts have held that any decision reached by the arbitral tribunal will be binding, even on the party who purportedly resiled.

Just as he did in relation to Nigeria, Professor Allot vehemently argued against the existence of the practice in Ghana.<sup>9</sup> In his opinion, there was a difference between what the courts in Nigeria and Ghana said the customary law was and what the law

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<sup>3</sup> Virtus Chitoo Igboke, ‘The Law and Practice of Customary Arbitration in Nigeria: *Agu v Ikewibe* and Applicable law issues revisited’ (1997) 41 *Journal of African Law* 201,202.

<sup>4</sup> We discussed this in Section 1.0 of Chapter Two as well as in Chapter Five of this thesis.

<sup>5</sup> Amazu A. Asouzu, *International Commercial Arbitration and African State* (Cambridge University Press 2001) 115.

<sup>6</sup> The West African Court of Appeal was a central appellate and final court for countries in pre-colonial West Africa, including both Ghana and Nigeria.

<sup>7</sup> (1932) 1 WACA 192.

<sup>8</sup> (1952) 13 WACA 76.

<sup>9</sup> We examined his controversial opinion in Section 3.0 of Chapter Five of this thesis.



actually was. According to the learned Professor, “put bluntly, whose law is it, and who is competent to declare it? Is it what I term judicial customary law, the law which the Judges have found or made; or is it the popular or practised customary law, the rules which people follow...?”<sup>10</sup> Professor Allot goes on to add that “I myself, through intensive fieldwork in Ghana, had become familiar with the Akan customary law on the subject as administered by the indigenous institutions”.<sup>11</sup>

Without revisiting issues that have been extensively discussed and resolved, the learned Professor Allot could not only be taken to have asserted that he knew more about the customs and practices of the people of Ghana and Nigeria than local Judges who themselves were natives and had grown up within the customary system, he was also by implication suggesting that he knew more about the customary law of the Ghanaian (and Nigerian) people than the local chiefs who are expected by law to provide expert evidence on issues relating to customary law and practice.<sup>12</sup> Thankfully, whatever remaining controversy as to the existence and scope of customary arbitration has now been resolved with the incorporation of customary arbitration into the new Ghanaian ADR Act 2010.

The legislative process for this ADR Act began as far back as 1998, when the Ghanaian government put together a taskforce to come up with a suitable alternative dispute resolution framework for Ghana, mainly in response to problems like those encountered in Nigeria. According to Kwadwo Sarkodie, this initiative was “motivated in part by concerns that the caseload of the Ghanaian courts was reaching unimaginable levels.”<sup>13</sup> Professor Paul Kirgis submits that the trial courts in Ghana were far too few to adequately cover the entire country, thus emphasizing the need

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<sup>10</sup> Antony Allot, ‘Customary Arbitration in Nigeria: A comment on *Agu v Ikewibe*’ (1998) 42 *Journal of African Law* 231,233.

<sup>11</sup> *ibid.*

<sup>12</sup> For example, Section 14(3) of the Nigerian Evidence Act 2011 provides that “Where a custom cannot be established as one judicially noticed, it may be established and adopted as part of the law governing particular circumstances by calling evidence to show that persons or class of persons concerned in the particular area regard the alleged custom as binding upon them”.

<sup>13</sup> Kwadwo Sarkodie, ‘Arbitration in Ghana-The Alternative Dispute Resolution Act 2010’ <[www.mayerbrown.com/files/Publication/5ee12231-1295-4559816789d93cdf2a06/Presentation/PublicationAttachment/91e048fe-67d4-4e3f-9d108bbf9861e753/ArbitrationGhana\\_Sarkodie.pdf](http://www.mayerbrown.com/files/Publication/5ee12231-1295-4559816789d93cdf2a06/Presentation/PublicationAttachment/91e048fe-67d4-4e3f-9d108bbf9861e753/ArbitrationGhana_Sarkodie.pdf)> accessed 28 January 2015.

for alternatives.<sup>14</sup> Furthermore, the pre-existing statutory framework, the Arbitration Act 1961 (Act 38),<sup>15</sup> which was largely influenced by the English Arbitration Act of 1950,<sup>16</sup> was outdated and in need of reform in order to adequately provide a viable alternative to litigation. Closely related is the fact that the Act was in need of revision and updating if it was to reflect and serve modern commercial needs.<sup>17</sup> The end result of this twelve-year long process was the Alternative Dispute Resolution Act 2010, which repealed and replaced the Arbitration Act 1961.

## **2.0 A CRITICAL ANALYSIS OF THE GHANAIAN ARBITRATION PRACTICE AS AGAINST THE NIGERIAN PRACTICE.**

### **2.1 Background**

The arbitration practice in Ghana is governed by the Alternative Dispute Resolution Act 2010 (“the ADR Act”). This Act, which is divided into five major parts, provides for arbitration, mediation, customary arbitration, an Alternative Dispute Resolution Centre and miscellaneous matters, respectively. However, in analysing this Act, we focus our discussion on the parts dealing with arbitration: Parts One, Three and Four.

### **2.2 Part One: Arbitration**

Part One provides for arbitration as a method of dispute resolution.<sup>18</sup> It is this very part of the Act that replaces the Arbitration Act 1961. This part of the new Act is largely modelled after the English Arbitration Act 1996, as against the Nigerian Act which is largely modelled after the UNCITRAL Model Law.<sup>19</sup>

Unlike the Nigerian Arbitration and Conciliation Act, which limits its scope to commercial disputes,<sup>20</sup> the ADR Act provides “for the settlement of disputes (and not

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<sup>14</sup>Paul kirgis, ‘Customary Arbitration in an Evolving Africa’ 1 <[www.indisputably.org/?p=2592](http://www.indisputably.org/?p=2592)> accessed 28 January 2015.

<sup>15</sup>Judicial Training Institute, ‘Acts, Decrees and Laws of Ghana’ <<http://jtighana.org/new/actdetails.php?id=21>> accessed 15 January 2015.

<sup>16</sup> Amazu A. Asouzu (n 5) 123.

<sup>17</sup> Kwadwo Sarkodie (n 13) 2.

<sup>18</sup> By arbitration, the Act means “arbitration” in its traditional sense. This part of the Act as we will come to see does not include customary arbitration. See Section 1.1.3 of this chapter.

<sup>19</sup>Funke Adekoya, ‘LCIA and Ghana Arbitration Centre symposium: the new Alternative Dispute Resolution Act 2010’ 2 <<http://uk.practicallaw.com/2-504-1004?service=arbitration>> accessed 29 January 2015; Kwadwo Sarkodie (n 13) 2.

<sup>20</sup> Preamble to the Nigerian Arbitration and Conciliation Act.

just commercial disputes) by arbitration, mediation and customary arbitration, to establish an Alternative Dispute Resolution Centre and to provide for related matters” (Phrase in bracket is mine).<sup>21</sup> It is therefore clear that as against the Nigerian Act which limits its scope to commercial disputes, the purview of the Ghanaian Act extends to any arbitrable dispute, thus providing a real alternative to litigation in Ghana. As we argued in Section 3.2 of Chapter Four, the Ghanaian approach is preferred.

The question then is this; what matters are arbitrable in Ghana? To its credit (and again unlike the Nigerian framework), the Ghanaian Act by implication of *Section 1* clearly states the matters which are within its jurisdiction. *Section 1 of the ADR Act* provides that the Act applies to all matters except those relating to national or public interest, the environment, the enforcement and interpretation of the Constitution; or any other matter that by law cannot be settled by an alternative dispute resolution method.

Kwadwo Sarkodie has rightly opined that “the concepts....are potentially broad and lacking in clear definition (they are not defined anywhere within the Act)”.<sup>22</sup> For example, the Act provides little guidance as to what qualifies as a national or public interest. One could argue that issues of national interest cover all matters that affect the nation or community as a whole and these arguably include environmental issues like global warming, oil spillage and deforestation. Environment and climate change professionals have for example submitted that “climate change is one of the most serious public health threats facing the nation...children, the elderly and communities living in poverty are most vulnerable”.<sup>23</sup> The confusion however sets in when the Act mentions matters relating to the environment as another separate and different subject matter to issues of public or national interest. The problem then is where to draw the line between issues of public or national interest and environmental issues since the latter could be said to be a part of the former. Was the subsection on the environment just for emphasis or did the draftsman have a different idea from what popularly obtains? If the draftsman had a completely different idea from the traditional view,

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<sup>21</sup> Preamble to the Ghanaian ADR Act 2010.

<sup>22</sup> Kwadwo Sarkodie (n 13) 2.

<sup>23</sup> Amanda MacMillan, ‘Global Warming 101’ NRDC (11 March 2016) <[www.nrdc.org/globalwarming/](http://www.nrdc.org/globalwarming/)> accessed 4 February 2015.

why not define same in the interpretation section to avoid controversy? If it was for emphasis sake, why not also emphasise issues like crime and public policy which can also be said to fall under issues of public and national interest? It is actually difficult to understand the mind-set of the draftsman.

The Act deepens this controversy when it exempts “any other matter that by law cannot be settled by an alternative dispute resolution method.” (emphasis mine)<sup>24</sup> As we will come to see in the course of this chapter, the Ghanaian draftsman made conscious efforts to reduce the involvement of the court in the process of arbitration in Ghana. For example, we see the Act ceding some of the usual powers of the courts to what it refers to as an appointing authority. It is however the position of this writer that by using the word “law” very loosely (and not statute), the Act unknowingly gives the same powers it sought to take away from the courts, back to the courts. This is because the word “law” when used very loosely includes laws ‘made’ by the court, which is case law.<sup>25</sup> This in other words makes the situation worse as the courts have been given the right to appropriate virtually anything they deem fit from the jurisdiction of the Act, notwithstanding any agreement by parties to resolve their dispute via arbitration. The implication of this section of the Ghanaian Act is arguably similar to *Section 2 of the Nigerian Act*, which seems to allow a court to revoke a valid arbitration agreement.<sup>26</sup>

This is bad precedent especially because the courts in general have in the past shown their reluctance to let go of some of their traditional powers to arbitration.<sup>27</sup> No doubt the courts in many jurisdictions are now open to arbitration but we must not forget that this change was a gradual and very contentious process, one that spanned decades even in more developed jurisdictions like England.<sup>28</sup>

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<sup>24</sup> Ghanaian ADR Act, section 1.

<sup>25</sup> In cases like *DPP v. Shaw* (1962) AC 220 and the rape case of *Regina v. R* (1991) 4 All ER 481, we see the English courts performing law making functions albeit in limited situations.

<sup>26</sup> For a discussion on the Nigerian position, see Section 5.2 of Chapter Four.

<sup>27</sup> We discussed this in Section 1.0 of Chapter Three.

<sup>28</sup> Ernest Lorenzen, ‘Commercial Arbitration-International and Interstate Aspects’ (1934) Yale Law School Scholarship Series, Paper 4588 <[http://digitalcommons.law.yale.edu/fss\\_papers/4588](http://digitalcommons.law.yale.edu/fss_papers/4588)> 716,717; Herbert Syme, ‘Arbitrability of Labour Disputes’ (1951) 5(3) Rutgers Law Review 45, 458; Janet

As we have seen in Chapter Two of this thesis, one must not forget that many of the legal frameworks (the law and the judiciary) in Nigeria and even Ghana are anachronistic. Unfortunately, and as we have seen in Chapter Two, the National Judicial Institute (NJI) in Nigeria lacks the capacity to perform its statutory function of ensuring the continued education of all judicial officers at the same time.

With this new provision, which arguably gives courts the power to make laws over issues relating to arbitration, this writer foresees new decisions of the court which restrict the purview of arbitration in certain areas. No wonder commercial lawyers like Kwadwo Sarkodie have opined that “the question of which matters fall within these categories will be the subject of extensive, and perhaps persistent, debate.”<sup>29</sup>

Under Part One of the ADR Act, every arbitration agreement must be in writing. However, unlike the Nigerian Arbitration Act which requires a signature,<sup>30</sup> the Ghanaian Act is more flexible in this regard as it does not require a signature.<sup>31</sup> Furthermore, in Ghana, a validly made arbitration agreement is only revocable by the agreement of the parties.<sup>32</sup> This is as against the situation in Nigeria where the courts seem to have unlimited powers to revoke an arbitration agreement.<sup>33</sup>

Interestingly, the outdated Nigerian Arbitration Act adopts a modern approach which is lacking in the Ghanaian ADR Act when it allows parties to incorporate an arbitration agreement from an external source into their contract. *Section 1(2) of the Nigerian Act* provides that “any reference in a contract to a document containing an arbitration clause constitutes an arbitration agreement if such contract is in writing and the reference is such as to make that clause part of the contract”. According to Tweeddale, a general reference to the said clause suffices to establish an intention to

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Rosen, ‘Arbitration under Private International Law: The Doctrine of Seperability and Competence de la Competence’ (1994) 17(3) *Fordhams International Law Journal* 599, 617.

<sup>29</sup> Kwadwo Sarkodie (n 13) 2.

<sup>30</sup> Nigerian Arbitration and Conciliation Act, section 1.

<sup>31</sup> Ghanaian ADR Act 2010, section 2(3).

<sup>32</sup> *ibid* section 3(2).

<sup>33</sup> Nigerian Arbitration and Conciliation Act, section 2.

incorporate an external arbitration clause into parties' contract.<sup>34</sup> In other words, parties need not use any specific words of incorporation.

The Convention on Contracts for the International Sales of Goods (CISG) Advisory Council, while interpreting the CISG,<sup>35</sup> opined that the terms can only be said to have been incorporated where the parties have expressly or impliedly agreed to their inclusion at the time of the formation of the contract and the other party had a reasonable opportunity to take notice of the terms.<sup>36</sup> In the *Machinery case*, the German Supreme Court opined that "it is generally required that the recipient of a contract offer that is supposed to be based on general terms and conditions have the possibility to become aware of them in a reasonable manner".<sup>37</sup> Knowledge of the incorporated terms may be inferred from negotiation between parties and/or trade practices.<sup>38</sup> In establishing an arbitration agreement via incorporation therefore, parties must be proven to either be expressly or impliedly aware of their inclusion.

Section 7 of the ADR Act also provides that "where a court before which an action is pending is of the view that the action or a part of the action can be resolved through arbitration, that court may with the consent of the parties in writing, despite that there is no arbitration agreement in respect of the matter in dispute, refer the action or any part of the action for arbitration". On the surface, this section of the Act seems pro-arbitration. However, it is the position of this writer that this section of the Act is to say the least, dictatorial and antithetical to arbitration. This writer questions the voluntariness of the consent purportedly obtained by the parties in such a situation. According to Dr Onyema, "practically, it is difficult to see how a party can withhold its consent under a Section 7 nudge by the court. It is suggested that in the light of the power (subtle as it is) wielded by a High Court Judge over parties in a matter before

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<sup>34</sup> Andrew Tweeddale, 'Incorporation of Arbitration Clauses' (2002) 68 Arbitration 1.

<sup>35</sup> It is also known as the Vienna Convention 1980, apparently because it was signed in Vienna in 1980.

<sup>36</sup> CISG-AC Opinion No. 13, Inclusion of Standard Terms under the CISG, Rapporteur: Professor Siegfried Eisele, College of Law, University of South Africa, Pretoria, South Africa. Adopted by the CISG Advisory Council following its 17<sup>th</sup> meeting in Villanova, Pennsylvania, USA, on 20 January 2013.

<sup>37</sup> German *Machinery case* (31 October 2001 Supreme Court) <<http://cisgw3.law.pace.edu/cases/011031g1.html>> accessed 8 March 2015.

<sup>38</sup> Austrian *Propane case* (6 February 1996 Supreme Court) <<http://cisgw3.law.pace.edu/cases/960206a3.html>> accessed 8 March 2015.

it, it may not be practicable for a party to withhold its consent to such suggestion by the court. This clearly begs the question of the genuineness of the consent obtained from the parties which may be more forced than voluntary. It therefore appears that the legislator was more interested in the formality of obtaining a written consent than evidence of a genuine intention of the parties to arbitrate their dispute.”<sup>39</sup> It will not be unreasonable for parties to expect that a Judge will be hostile to or biased against their submissions if they refuse to acquiesce to his or her “suggestion” to arbitrate.

In terms of the arbitration procedure and proceedings, the Ghanaian framework allows parties to resolve their disputes either via ad hoc arbitration, under the rules of any institution of their choice or under the rules and auspices of the newly established Alternative Dispute Resolution Centre in Ghana.<sup>40</sup> Furthermore, unlike the Nigerian Arbitration Act which imposes its own rules on domestic arbitration parties, *Section 5 (3) of the ADR Act* provides that “where reference is made to a person or institution other than the Centre, the procedure and rules shall be as the parties and arbitrators determine”. In line with the spirit of arbitration therefore, the Ghanaian Act allows parties to determine the method by which their disputes will be administered.

In composing the arbitration tribunal, the ADR Act again sticks with its underlying party autonomy principle when it allows parties to determine the number of arbitrators that will administer their dispute. The Act nonetheless inserts a proviso, which is that the number must not be an even number.<sup>41</sup> *Section 13(2) of the same Act* concludes the section by providing for a default number of three arbitrators. The Nigerian Arbitration and Conciliation Act similarly allows parties to determine the number of their arbitration panel, failing which it prescribes a default number of three arbitrators.<sup>42</sup> The Nigerian Act does not however require a mandatory odd numbered tribunal. Technically therefore, parties under the jurisdiction of the Nigerian Act have the flexibility to appoint an even numbered arbitration tribunal.<sup>43</sup>

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<sup>39</sup>Emilia Onyema, ‘The New Ghana ADR Act 2010: A critical Overview’ (2012) 28 *Arbitration International* 101, 114.

<sup>40</sup> Ghanaian ADR Act 2010, section 5(2).

<sup>41</sup> *ibid*, section 13(1).

<sup>42</sup> Arbitration and Conciliation Act, section 5.

<sup>43</sup> Of course this is not practical and so very unlikely.

The idea behind an odd numbered tribunal is not farfetched; it prevents a deadlock arising from equal voting rights, thus preventing controversy and ultimately court action. As we will see later in this chapter and also in Chapter Seven, even the *English Arbitration Act*, by implication of certain provisions, discourages parties from submitting to an even numbered tribunal. Having to resort to court action clearly defeats the idea behind an arbitration in the first place. Notwithstanding the fact that it is unlikely that any experienced legal practitioner will agree to an even numbered tribunal, the Nigerian Act will do well to clearly prohibit even numbered panels.

*Section 15 of the ADR Act* mandates an arbitrator to disclose in writing, any circumstance likely to give reasonable cause to doubt his/her independence or impartiality. The Ghanaian draftsman most likely borrowed this provision from arbitration institutions like the ICC's International Court of Arbitration Rules ("ICC Arbitration rules") and the London Court of International Arbitration (LCIA rules). For example, *Article 11(2) of the ICC's Rules* provides that "a prospective arbitrator shall disclose in writing to the secretariat, any facts or circumstances which might be of such a nature as to call into question the arbitrators' independence in the eyes of the parties, as well as circumstances that could give rise to reasonable doubt as to the arbitrators' impartiality. The secretariat shall provide such information to the parties in writing and fix a time limit for any comment from them".<sup>44</sup> Furthermore, by virtue of *Article 5.4 of the London Court of International Arbitration Rules*, the arbitrator is also expected to make a statement as to his willingness and ability to ensure the expeditious and efficient conduct of the arbitration.<sup>45</sup>

This no doubt is good practice especially since it requires much more than technical knowledge of the subject matter to properly administer a dispute. The arbitrator must not only be fair and just, he must also be seen to be fair and just. Because of the confidential nature of arbitration, information as to the arbitrators' previous relationship with the parties or the subject matter of the dispute may not be within public domain, knowledge of which may influence parties' choice of arbitrator.

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<sup>44</sup> ICC Arbitration Rules 2012; see also LCIA Rules, article 5.4.

<sup>45</sup> LCIA Rules 2014; See also ICC Arbitration Rules 2012, article 13 (1).



The Ghanaian Act introduces into its framework what it calls an arbitration management conference, which the arbitrator is expected to call within fourteen days after being appointed.<sup>46</sup> In an apparent bid to save time and money, the Act allows this conference to be held either in person or through electronic media. During the conference, parties will be expected to discuss issues relating to the successful conduct of the arbitration.<sup>47</sup> It should be pointed out that an institution like the ICC's International Court of Arbitration, has a similar provision which allows parties to agree on the contents of the Terms of Reference and issues relating to procedure.<sup>48</sup> As we argue in Section 2.1.5 of Chapter Seven, this provision will in the long run encourage a speedy, efficient and arguably a cheaper arbitration process.

Interestingly, in *Section 30 of the ADR Act*, an arbitration institution, an appointing authority or any other individual is allowed to facilitate a conciliation conference as part of the arbitration process, on the condition that the arbitrator is not also appointed as conciliator. Confusion sets in when this section is considered against *Section 47*, which allows an arbitrator to encourage the "settlement of the dispute with the agreement of the parties".<sup>49</sup> However *subsection 2 of that Section 47* provides that "the arbitrator may for the purposes of subsection (1), use mediation or other procedures at any time during the arbitral proceedings". Unlike *Section 30 of the ADR Act*, *Section 47 of the same Act* seems to allow an arbitrator to also serve as a mediator in the same proceeding. This method which is known as Med-Arb, touches on a number of ethical issues,<sup>50</sup> especially because the arbitrator who assumes the position of a mediator may at some point have to revert to his position as a decision maker (an arbitrator) if the mediation proceeding fails. During a mediation process, the parties are expected to "bare it all" to the mediator, who in turn tries to help parties reach a mutually agreeable conclusion. It is not unreasonable to assume that important information which was disclosed to the mediator-arbitrator during the course of the mediation

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<sup>46</sup> Ghanaian ADR Act 2010, section 29.

<sup>47</sup> *ibid.*

<sup>48</sup> ICC Arbitration Rules 2012, article 24.

<sup>49</sup> Ghanaian ADR Act 2010, section 47(1).

<sup>50</sup> Susan Blake et al, *A Practical Approach to Alternative Dispute Resolution* (1<sup>st</sup> Edition, Oxford University Press 2011) 389.

proceedings will influence the mediator-turned-arbitrator when deciding the arbitration. As *Redfern and Hunter* have rightly asked, “how can an arbitrator who has previously held private discussions with the parties separately satisfy (or appear to satisfy) the requirement of impartiality and a fair hearing?”<sup>51</sup> This *Section 47 of the Act* as well as the general practice where the same person acts as mediator and arbitrator in the same proceedings should be discouraged.<sup>52</sup>

One recurrent problem in the Nigerian Arbitration Act, which was highlighted in Chapter Four, was the constant and unnecessary involvement of the courts in the arbitration process. The Ghanaian Act seems to have taken care of this problem by re-assigning many of the tasks normally within the jurisdiction of the courts to what it calls an “appointing authority”. In other words, the appointing authority’s duties under the Ghanaian Act go beyond the traditional one of support or assistance. For example, under this Act, a party who is dissatisfied with the arbitrators’ ruling on jurisdiction is able to appeal to the appointing authority.<sup>53</sup> Furthermore, an arbitrator is also able to appeal to the appointing authority to determine issues relating to relief from any liability incurred as well as in respect of entitlement to fees or expenses.<sup>54</sup>

The Act however does little to check and balance these powers of the appointing authority, who many times may be a private individual. The position and powers of an appointing authority under the Ghanaian Act ought to by default, be exercisable only by the Alternative Dispute Resolution Centre, in order to encourage a just, fair and standardised system. In designing how this would work in practice, a cue can be taken from the ICC’s Court of International Arbitration, which also performs similar decision making functions (to the Ghanaian appointing authority), although in a more organized and sophisticated fashion. The ICC’s Court’s jurisdiction goes beyond general administration and appointment of arbitrators.<sup>55</sup> The ICC’s court for example is empowered to decide on issues relating to the validity of the agreement and the

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<sup>51</sup> Nigel Blackaby et al, *Redfern and Hunter on International Arbitration* (6<sup>th</sup> edn, Oxford University Press 2015) 48.

<sup>52</sup> See Section 2.1 of Chapter Three for more discussion on this

<sup>53</sup> Ghanaian ADR Act 2010, section 26.

<sup>54</sup> *ibid* section 19(2).

<sup>55</sup> ICC Arbitration Rules 2012, articles 1 and 13.

jurisdiction of the tribunal,<sup>56</sup> consolidate two or more arbitrations being conducted under the auspices of the ICC,<sup>57</sup> administer issues relating to the challenge and replacement of arbitrators, determines issues relating to the cost of arbitration and fees of the arbitrators,<sup>58</sup> administer issues dealing with extension of time applications as well as scrutinise awards,<sup>59</sup> among many other functions.

The ICC's Court consists of a President, Vice Presidents and members (and alternate members of the Court).<sup>60</sup> In practice however and considering the busy schedule of members, the ICC Court in the performance of its functions makes use of committees to perform its statutory functions.<sup>61</sup> A typical committee consists of the President and two other members of the Court, who are appointed at the last plenary session of the court. The President (or in his absence, any of his Vice Presidents) is however allowed to make urgent decisions on behalf of the Court, provided that such decisions are reported to the Court at its next session.<sup>62</sup> Countries like Ghana will do well to incorporate this ICC Court system model to prevent abuse, guarantee quality and certainty of decision as well as ensure justice in arbitral matters.

Notwithstanding the Ghanaian Act's attempt to keep the court out of the administration of arbitration, we still see instances where specific powers are restricted (and rightly so) to the Ghanaian court.<sup>63</sup> For example, *Section 28 of the ADR Act* allows a party to an arbitration agreement who was not notified of an existing arbitration proceeding to challenge the proceedings in court on certain grounds. One of the said grounds for a *Section 28 challenge* relates to the question as to whether there is a valid arbitration agreement.<sup>64</sup> This *Section 28(1) (a) of the Act* is in other words saying that the standing of one party to institute the said application against the other party, rests on the very agreement which he is claiming does not exist (and possibly

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<sup>56</sup> *ibid* article 6(4).

<sup>57</sup> *ibid* article 10.

<sup>58</sup> *ibid* articles 36 and 37.

<sup>59</sup> *ibid* article 33.

<sup>60</sup> Appendix 1 to the ICC Rules ("Statutes of the International Court of Arbitration"), article 2.

<sup>61</sup> ICC Arbitration Rules, article 1(4); see Statutes of the International Court of Arbitration, article 5.

<sup>62</sup> ICC Arbitration Rules, article 1(3)

<sup>63</sup> As we argue in Section 3.2 of this chapter and in Chapter Seven, the involvement of the court in arbitration is not necessarily antithetical to arbitration.

<sup>64</sup> Ghanaian ADR Act 2010, section 28(1) (a).

may not exist). The idea behind this section can be likened to the idea of the putative law of an arbitration agreement. This implies that any dispute as to the existence or validity of an arbitration agreement should be resolved by the law that would have governed the agreement if it was valid.<sup>65</sup>

Other powers of the court include the power to revoke an arbitrator's authority in certain defined circumstances.<sup>66</sup> For example, an arbitrator's authority can be revoked when there is reasonable cause to doubt the arbitrator's impartiality or if the arbitrator is proven not to meet pre-agreed qualifications or experience.<sup>67</sup> By virtue of *Section 39 of the ADR Act*, the Ghanaian High Court has the power to support arbitral proceedings by making an order for the taking of evidence of witnesses or an order for the preservation of evidence amongst others. The High Court also has the power to hear applications on preliminary questions of law, if the court is satisfied that the question substantially affects the rights of the other party.<sup>68</sup>

The Ghanaian Act also delves into seemingly minute details which are not found in the Nigerian Act. The Act reflects modern realities when it allows parties to serve and exchange arbitration documents via email and facsimile among other methods of electronic communication.<sup>69</sup> This will save time and cost as well as promote an efficient process. *Section 42 of the ADR Act* also allows parties to be represented by any counsel or person of their choice. This section of the Act also takes care of the controversy arising from the use of the title "legal practitioner" in the Nigerian Act.<sup>70</sup> *Section 22 of the ADR Act* makes provision for the arbitrators' fees, while *Section 23 of the said Act* cloaks an arbitrator (and anyone who works with the arbitrator during the proceeding) with immunity from liability for any act or omission arising in the course of the discharge of his functions, unless the arbitrator (or anyone working with or for the arbitrator) is shown to have acted in bad faith.

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<sup>65</sup> See Article 10 of the Rome Regulation.

<sup>66</sup> Ghanaian ADR Act 2010, section 18(1).

<sup>67</sup> *ibid* section 18(2)(a)(b).

<sup>68</sup> *ibid* section 40.

<sup>69</sup> *ibid* section 34(10).

<sup>70</sup> See Section 2.2 of Chapter Four.

### 2.3 Part Three: Customary Arbitration

Part Three incorporates the Ghanaian customary arbitration practice into its legislative framework. It must be submitted that this incorporation is a bold and very laudable initiative by the Ghanaian government.<sup>71</sup> As Asouzu noted, apart from Ghana, no other African arbitration statute has made any explicit provision for customary arbitration.<sup>72</sup> By providing a legislative framework on arbitration, the Ghanaian government has not only validated the customary arbitration practice in Ghana, thereby ending any suspicion or controversy surrounding the existence of the practice in Ghana (and by extension Nigeria), it has more importantly incorporated a familiar and deeply rooted framework into its alternative dispute resolution framework, thus providing impetus to its efforts to reduce the workload of the court.

A fundamental difference between Part One (arbitration) and Part Three (customary arbitration) in Ghana (and even in Nigeria) is in regards to the governing or applicable law of the arbitration. While under Part One, parties have the choice to resolve their dispute via the general laws of a particular jurisdiction (and/or other considerations as the parties may determine),<sup>73</sup> under Part Three, the customary law (and trade practices) of a particular set of people, determine the basis and standard of the decision.<sup>74</sup> Furthermore, while Part One requires a written arbitration agreement, under Part Three, an arbitration agreement need not be in writing.<sup>75</sup>

In addition, there is a difference between what is arbitrable under Part One and Part Three of the Act. According to the Ghanaian Act, “a party to a dispute may submit the dispute to customary arbitration under this Part...Except as otherwise ordered by a court and subject to any other enactment in force, a person shall not; a) submit a criminal matter for customary arbitration; or b) serve as an arbitrator in a criminal

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<sup>71</sup> Emilia Onyema (n 39) 115

<sup>72</sup> Amazu A. Asouzu (n 5) 118. Note that the Ghanaian ADR Act 2010 had not been enacted at the time Amazu A. Asouzu gave this opinion. We previously noted that consultations relating to the Act started as far back as 1998 and so as at the time Asouzu gave his opinion, it was obvious from discussions surrounding the Act that there was a clear consideration and intention to incorporate customary arbitration into the Act.

<sup>73</sup> Ghanaian ADR Act 2010, section 48.

<sup>74</sup> We discuss this in more detail in Section 2.2 of Chapter Five.

<sup>75</sup> Joe Mante and Issaku Ndekuguru, ‘Arbitrability in the Context of Ghana’s New Arbitration Law’ (2012) 15(2) International Arbitration Law Review 31.

matter...".<sup>76</sup> In other words, only criminal matters are exempted from the scope of customary arbitration. On the other hand, we have seen that Part One has a different and more detailed list of what is not arbitrable. According to *Section 1 of the Act*, these matters include those relating to national or public interest, the environment, the enforcement and interpretation of the constitution; or any other matter that by law cannot be settled by an alternative dispute resolution method. It is not out of place to imply from the aforementioned sections that matters which deal with national or public interest, the environment, the enforcement and interpretation of the constitution can be resolved through customary arbitration.

Of course, one can argue that decisions and enactments that touch on arbitration extend to customary arbitration. This writer however opposes this argument in its entirety, on the basis that the ADR Act clearly sought to distinguish between these two systems of arbitration and does not establish any overlap in any way between them. Admittedly, the extension argument may apply in a country like Nigeria which has not made different provisions for arbitration and customary arbitration. However, to the extent that the Ghanaian draftsman provides two different parts for arbitration and customary arbitration and more importantly to the extent that these different parts define what is not arbitrable under each of their provisions respectively, each part is exclusively limited to its subject and so cannot be extended to cover the other. In other words, unless any other statute or law on arbitration in Ghana expressly includes customary arbitration, the use of the word "arbitration" cannot be said to include customary arbitration since the principal arbitration framework in the country seems to have separated it.

Except in one or two other superficial cases (like the provision relating to the number of arbitrators and the writing requirement),<sup>77</sup> the process of administering disputes under Part One and Part Three of the Act is more or less the same. For example, like Part One of the Act, Part Three provides that upon nomination, a customary arbitrator is expected to disclose any circumstance likely to give reasonable cause to doubt his

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<sup>76</sup> Ghanaian ADR Act 2010, section 89(1) (2).

<sup>77</sup> *ibid* sections 13 and 95.

independence or impartiality during the proceedings.<sup>78</sup> Parties under the Act may either opt to resolve their dispute via ad hoc<sup>79</sup> or institutional arbitration (or through the rules and practice of the ADR centre).<sup>80</sup> The court is also empowered to refer any dispute pending before it to customary arbitration.<sup>81</sup> The appointment of the customary arbitrator may also be challenged based on the same considerations provided for in Part One of the Act.<sup>82</sup> *Section 109 of the Act* not only provides that a customary arbitration award is binding between parties and any person claiming through them, it also provides that the said award need not be registered in a court for it to be binding. Like conventional arbitration, it may however be registered for the purposes of record and/or enforcement.<sup>83</sup> *Section 111 of the Act* provides that a customary arbitration award is to be enforced like every other judgement of the court.

This writer therefore questions the idea behind the different provisions for arbitration and customary arbitration, especially since it is clear from our discussion that apart from a few minor differences, the provisions governing arbitration in Part One and customary arbitration in Part Three are more or less the same. It is submitted that customary arbitration ought to have been incorporated into Part One of the Act. For fundamental differences, if any, it is submitted that just as the arbitration frameworks in jurisdictions like Nigeria and England have the same framework for both domestic and international arbitration but makes separate provisions where necessary (for example in enforcement provisions), the same could have been done for customary arbitration. There is no point introducing a whole new part which virtually enunciates the same principles when the same can be incorporated into one.

An omission of Part Three of the Act is the fact that it only envisages submission agreements; situations where the agreement to arbitrate is reached after the dispute has arisen.<sup>84</sup> *Section 90 of the Act* provides that the claimant initiates the arbitration

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<sup>78</sup> *ibid* section 98.

<sup>79</sup> *ibid*.

<sup>80</sup> We discuss this in Section 1.1.4 of this chapter.

<sup>81</sup> Ghanaian ADR Act 2010, section 91.

<sup>82</sup> *ibid* sections 15 and 99.

<sup>83</sup> *ibid* section 110.

<sup>84</sup> *ibid* section 90.

when he reports the dispute to an arbitrator of his choice, who the respondent has the option to accept or reject. By this section, the Act seems to have ruled out the possibility of a pre-dispute agreement in customary arbitration, possibly because of the difficulty in proving their existence since many customary arbitration agreements are oral. It must however be emphasized that there is nothing under either customary law or the Ghanaian statute and case law that precludes parties from making written customary arbitration agreements. It is therefore opined that as the awareness and level of education continues to increase in Ghana and even in Nigeria, both countries will probably grow into written arbitration agreement. Besides, as we have seen in Section 2.3 of Chapter Five of this thesis, oral contracts are recognised under the Nigerian and Ghanaian law; the same conditions ought to be extended to pre-dispute oral arbitration agreements.

#### **2.4 Part Four: Alternative Dispute Resolution Centre ("ADRC")**

Part Four of the Ghanaian Act establishes and provides for an Alternative Dispute Resolution Centre ("the Centre"), a body corporate with perpetual succession and a common seal, to facilitate the practice of alternative dispute resolution in Ghana. The Centre is run by a governing Board of ten members comprising of one representative of the Ghana Chamber of Commerce, the Ghana Bar Association, and the judiciary, amongst other organizations.<sup>85</sup> Members of the Board are appointed and can be sacked by the President of Ghana.<sup>86</sup>

Commentators have expressed dissatisfaction with the involvement of the government in the administration of the institution.<sup>87</sup> At the London Court of International Arbitration and Ghana Arbitration Centre symposium which held in Ghana in 2010, Funke Adekoya, SAN while summarising some of the conclusions made during the forum, submitted that "while government support for the development of arbitration is commendable, this direct involvement by the government detracts from the arbitration friendly position that the country is trying to promote...local practitioners concluded that the extent of government was counter-

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<sup>85</sup> *ibid* section 117 (1) (a)-(e).

<sup>86</sup> *ibid* section 118 (5).

<sup>87</sup> Funke Adekoya (n 19) 2; Kwadwo Sarkodie (n 13) 2.



productive and not in the interest of the growth of arbitration in the country...Practitioners indicated their intention to propose a drastic review of the Act, in order to strictly delimit the supervisory relationship of the government over the ADR centre". The question then is whether the government's involvement in the administration of the Centre fundamentally affects the "arbitration friendliness" of Ghana so much as to justify a drastic review of this part of the Act.

No doubt, because of the private nature of arbitration, it is preferable to reduce to the barest minimum, the involvement of government in the administration of arbitration. It is however an exaggeration to suggest that the involvement of the President of Ghana in the appointment of Board members affects the reputation of the nation as arbitration friendly. When we talk of being arbitration friendly, we essentially refer to the willingness of the government and the courts of the land to recognize and enforce a lawfully made arbitration agreement and award.<sup>88</sup> *Section 3(2) of the ADR Act* provides for the irrevocability of an arbitration agreement except by the agreement of the parties. This is as against *Section 2 of the Nigerian Arbitration and Conciliation Act*.<sup>89</sup> The Ghanaian courts are also mandated not only to recognize any validly made arbitration agreement,<sup>90</sup> but more importantly to enforce any resulting award.<sup>91</sup>

In fact, the Act arguably takes its "arbitration friendliness" a step too far when it empowers the court to refer to arbitration (with the parties' consent), any litigation which in its opinion can be resolved by arbitration.<sup>92</sup> Furthermore, *Section 116 of the Act* provides that "the Centre shall not be under the direction or control of any person or authority in the performance of its function". It is therefore submitted that to the extent that the Act has shown its unequivocal willingness to recognize and enforce any validly made arbitration agreement as well as arbitration awards (both domestic and international), and until such a time as the courts are shown to be adopting a contrary position to the provisions of the Act, it is erroneous to suggest that the mere

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<sup>88</sup>Gbenga Bamodu, 'Legislative Competence Over Arbitration In Nigeria: Towards Resolving the Constitutional Controversy' (2016) 19(1) *International Arbitration Law Review* 1, 3.

<sup>89</sup> See Section 5.2 of Chapter Four.

<sup>90</sup> Ghanaian ADR Act 2010, section 6(2).

<sup>91</sup> *ibid* sections 52 and 59.

<sup>92</sup> *ibid* section 7(1).

involvement of the President in the appointment of Board members affects the reputation of the nation as an arbitration friendly jurisdiction. Besides it is difficult to see how the President's involvement in the appointment of members of the Board affects the integrity of a party constituted arbitration panel and process.

Moreover, the President's involvement in the administration of the Centre is within prescribed boundaries. The Act clearly defines and/or limits the membership of the board to representatives from a list of credible organizations. In the exercise of this power, it will be expected that the President, in selecting members from each organisation, will take advice or nominations from the leadership of each organisation. Besides, it is usual for the President in many countries to be involved in the appointment of the Chief Justice of many countries. For example, in *Article 148 of the Ghanaian Constitution*, the President is empowered to appoint the Chief Justice of Ghana upon the recommendation of the Judicial Council.<sup>93</sup> Furthermore in Nigeria, the President of Nigeria not only appoints the Chief Justice of Nigeria, he also appoints all the individual Justices of the Supreme Court, all the Justices of the Court of the Appeal, all the justices of the Federal High Court as well as the Justices of the National Industrial Court, upon the recommendation of the National Judicial Council.<sup>94</sup> Notwithstanding the Presidents' involvement in the appointment process of these senior Judges, it is unreasonable to challenge the operation of the doctrine of separation of powers and/or the independence of the judiciary on the basis of this. By extension, it is erroneous to suggest without any form of proof that the President's involvement in the appointment of Board members affects the independence of the governing Board.

Besides, it must be emphasised that the Centre was not created to administer arbitration alone, instead the purview of the Act extends to other forms of dispute resolution mechanisms like mediation. Assuming without conceding that the involvement of the President in the appointment of the governing board undermines

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<sup>93</sup> Constitution of the Republic of Ghana 1992.

<sup>94</sup> 1999 Constitution of the Federal Republic of Nigeria 1999, sections 231(1) (2), 238(1) (2) and 252(1) (2); Constitution of the Federal Republic of Nigeria (Third Alteration) Act 2010, section 254B.

arbitration as a method of dispute resolution, it is submitted that the effect is negligible and not enough reason to advocate for a drastic or urgent review. Until such a time as when the involvement of the President in the appointment of the Board members is seen to be inimical to the growth and practice of not only arbitration but also the other dispute resolution methods, this writer considers any calls for the review of this part of the Act unnecessary. Admittedly, in order to avoid controversy and abuse, it may be necessary for the Act to clearly lay down the procedure by which the President of Ghana would select the Board members.

In order to achieve its objectives, the Centre provides facilities for the resolution of disputes through arbitration. It also keeps a register of arbitrators (which parties to an ad hoc arbitration may consult), provides guidelines on fees for arbitrators, conducts research and provides education on arbitration in general, among many other statutory functions.<sup>95</sup>

By virtue of *Section 5 and 90 of the Act*, parties to an arbitration and customary arbitration under Part One and Part Three respectively, have the option to conduct their arbitration under the auspices and rules of the ADR Centre.<sup>96</sup> Subject to parties' agreement, the Centre handles all aspects relating to the administration of the arbitration.<sup>97</sup> For example, parties may request that the Centre appoints a customary arbitrator on their behalf.<sup>98</sup> The Centre is allowed to maintain a register of qualified arbitrators,<sup>99</sup> which parties even in an ad hoc arbitration are allowed to have access to upon request.<sup>100</sup> The ADR rules also provide for an arbitration management conference to afford parties the opportunity to agree on procedural issues amongst others.

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<sup>95</sup> Ghanaian ADR Act 2010, section 115.

<sup>96</sup> The ADR Centre's Rules are contained in the second schedule of the Act.

<sup>97</sup> Article 1 of the ADR Centres Rules.

<sup>98</sup> Ghanaian ADR Act 2010, section 96.

<sup>99</sup> *ibid* section 92.

<sup>100</sup> *ibid* section 14(6).

### 3.0. THE UNCITRAL MODEL LAW

#### 3.1 Background

The United Nations Commission on International Trade Law (UNCITRAL), a subsidiary of the General Assembly of the United Nations, was established in 1966 to among other things, assist the United Nations to improve its legal frameworks on international trade. The UNCITRAL has since its inception produced Model Laws in specialised areas like international sales of goods, electronic commerce, insolvency, security interests and international commercial dispute resolution (including arbitration and conciliation). The Model Law on International Arbitration was adopted by the UNCITRAL on 21<sup>st</sup> of June 1985.<sup>101</sup> Caroline Cazenave and Marie Fernet referred to the law as “a ready-made law that serves as a model for States working to revise or adapt an arbitration law”.<sup>102</sup>

The Model Law provides a unified legal framework for the fair and efficient settlement of disputes arising in international commercial relations.<sup>103</sup> In its explanatory notes, UNCITRAL points out that the Model Law seeks to also address “considerable disparities in national laws on arbitration. The need for improvement and harmonization was based on findings that national laws were often inappropriate for international cases”.<sup>104</sup> It is therefore clear that the Model Law sought to promote a kind of harmonised international arbitration framework.<sup>105</sup>

Notwithstanding one of the primary intentions of the Model Law, which is to provide a model framework for international arbitration, it also to an extent provides a guide from which domestic arbitration frameworks can copy. The Commission is therefore right in observing that “while the Model Law was designed with international commercial arbitration in mind, it offers a set of basic rules that are not, in and of

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<sup>101</sup>The General Assembly of the United Nation did not however adopt this law until the 11<sup>th</sup> of December 1985, when it had consulted with arbitration experts and institutions.

<sup>102</sup> Caroline Cazenave and Marie Fernet, ‘The Uniform Law on International Commercial Arbitration’ (2014) 3 International Business Law Review Journal 219.

<sup>103</sup> UNCITRAL Model Law on International Commercial Arbitration 1985 With amendments as adopted in 2006 <[www.uncitral.org/pdf/english/texts/arbitration/ml-arb/07-86998\\_Ebook.pdf](http://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/07-86998_Ebook.pdf)> accessed 19 February 2015.

<sup>104</sup> *ibid* 25.

<sup>105</sup> Janet A Rosen, ‘Arbitration Under Private International Law: The Doctrine of Separability and Competence de la Competence’ (1993-1994) 17 Fordham International Law Journal 599,620.

themselves, unsuitable to any other type of arbitration.”<sup>106</sup> This is because it incorporates important issues and principles in arbitration. Jurisdictions like Nigeria, Spain, Zimbabwe, Zambia, Venezuela, Ukraine, Turkey, Tunisia, Thailand, Singapore, among many others were quick to model their Arbitration Act’s after this particular version of the Model Law.

On the 7<sup>th</sup> of July 2006, the Commission at its 34<sup>th</sup> session chose to update the existing Model Law to reflect the new trends within the sphere of commercial law. Unfortunately, and as we have mentioned, the Nigerian Act has not been adapted to reflect the changes in the new Model Law or better still to reflect the current trends in arbitration. We now highlight some of the relevant changes to the Model Law.

### **3.2 New Changes in the Model Law 2006**

One of the most important changes to the Model Law relates to the writing requirement. *Article 7(2) of the old Model Law*, just like the Nigerian framework, required that a valid agreement be written and signed by the parties to the agreement. However, as the Committee rightly noted, “...in a number of situations, the drafting of a written document was impossible or impractical. In such cases where the willingness of the parties to arbitrate was not in question, the validity of the arbitration should be recognized.”<sup>107</sup> This observation influenced the newer version of *Article 7 in the 2006 Model*. The new version of the article provides two options. The first option is more or less a reproduction of the old *Article 7 of the Model Law*. One significant addition to this Option one is that it defines a written arbitration agreement to include an oral agreement which is subsequently recorded in writing. Very importantly, the new Model Law removes the signature requirement from Option one.

Option two of the new Model Law assumes a more flexible approach when it defines an arbitration agreement as an “agreement by the parties to submit to arbitration, all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not”.<sup>108</sup> We therefore see the

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<sup>106</sup> UNCITRAL Model Law (n 103) 25.

<sup>107</sup> *ibid* 28.

<sup>108</sup> Revised Model Law 2006, article 7.

Model Law dispensing with the writing requirement of an arbitration agreement.<sup>109</sup> Very important again is the fact that this provision is drafted in a way that allows non-commercial and/or non-contractual agreements to be resolved via arbitration. The new *Article 7 of the Model Law* places more emphasis on the existence of an agreement which can be established from an examination of the facts and reduces the very unnecessary emphasis on form of the old Article 7,<sup>110</sup> which as we have previously and severally pointed out in the course of this thesis, is unsuitable for a developing country like Nigeria.<sup>111</sup> As was highlighted in Chapter Four of this thesis, the Nigerian arbitration practice will very well benefit from a less formalistic framework.<sup>112</sup> It should be noted that *Article 7(6) of the new Model Law* also retains the incorporation provision found in the old Model Law.

The new *Article 7 of the Model Law* has ripple effects on other parts of the Act. For example, under the old Model Law, a party who sought to enforce his arbitration award in court needed to attach copies of the arbitration agreement and award.<sup>113</sup> However, the new *Article 35* dispenses with the requirement for a copy of the arbitration agreement in an application for the enforcement of an arbitration award.

The relevance of this Option two of the new *Article 7* within the sphere of international arbitration remains to be seen in view of *Article IV of the New York Convention*, which requires any party who seeks to enforce his international arbitration award in another jurisdiction, to submit a written version of the agreement. Until the New York Convention allows parties to an oral arbitration agreement to enforce same without

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<sup>109</sup> Hong-Lin Yu, 'Written Arbitration Agreements - What Written Arbitration Agreements?' (2013) 32(1) Civil Justice Quarterly 68, 77.

<sup>110</sup> Christopher Liebscher, 'Interpretation of the Written Form Requirement Article 7(2) UNCITRAL Model Law' (2005) 8 International Arbitration Law Review 164; Caroline Cazenave and Marie Fernet (n 102) 225.

<sup>111</sup> Because of some of the difficulties associated with the proof of oral agreements, Redfern and Hunter on International Arbitration point out that courts in some arbitration friendly jurisdictions have been reluctant to enforce arbitration agreements that are not contained in a written document or otherwise contained in an exchange of communications between the parties. See Nigel Blackaby et al, Redfern and Hunter on International Arbitration, (5<sup>th</sup> Edition, Oxford Press, 2009) 78. See also the following cases- *Kahn Lucas Lancaster Inc v. Lark International Ltd* 186 F.3d 210 (2<sup>nd</sup> Cir. 1999); *Glencore Ltd v Degussa Engineered Carbons LP* 848 F Supp. 2d 410 (SDNY 2012).

<sup>112</sup> Article 7(6) of the Model Law retains the incorporation of agreement provision found in the previous Model.

<sup>113</sup> UNCITRAL Model Law 1985, article 35(2).

any strict writing requirement, the use and relevance of Option two in the practice of international arbitration is very limited (possibly not existing). Of course, this will probably never happen mainly because of the difficulties that will be associated in proving and enforcing oral agreements at an international level.

At this point, one is tempted to ask why this flexible option was introduced into a model for international arbitration since as we have seen, the enforcement of an international arbitration award requires a written agreement. A plausible explanation is that the UNCITRAL is moving away from its traditional role of providing an international commercial arbitration model to a more encompassing model.

Another very relevant variation of the Model Law is *Article 17*. *Article 17 of the old Model Law* empowered the tribunal to take interim measures to protect the subject matter of the dispute. However, the old Law did not define the extent or scope of this power. As Hew Dundas rightly noted, the question of interim measures has been around the arbitral community for many years but was brought sharply into focus by the 2006 revision to the Model Law.<sup>114</sup> Since then, institutions like the International Chambers of Commerce (ICC),<sup>115</sup> the London Court of International Arbitration (LCIA),<sup>116</sup> the Singapore International Arbitration Centre (SIAC)<sup>117</sup> and the International Centre for Dispute Resolution (ICDR)<sup>118</sup> amongst many other arbitration institutions, have since incorporated same into their frameworks.

The new *Article 17* expands this power and goes into more detail about how this power should be exercised.<sup>119</sup> A tribunal may issue an interim order: to maintain or restore the status quo pending the determination of the dispute, prevent a party from taking an action that will cause current or imminent harm to the arbitral process, preserve or freeze assets out of which an award may be satisfied from and preserve evidence that

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<sup>114</sup> Hew R. Dundas, 'Interim Measures in International Arbitration- An English Judicial Perspective: Pearl Petroleum v. Kurdistan Regional Government of Iraq' (2016) 82(2) Arbitration 191.

<sup>115</sup> ICC Arbitration Rules, article 29.

<sup>116</sup> LCIA Rules, article 25.

<sup>117</sup> SIAC Rules, article 26.

<sup>118</sup> ICDR Rules, article 37.

<sup>119</sup> Markus Reider and Andreas Ernst, 'UNCITRAL Arbitration Rules – Institutional Reform' (2015) 16(6) International Arbitration Law Review 179, 184.

may be relevant and material to the resolution of the dispute.<sup>120</sup> The said provision goes on to list the conditions which an applicant for such an order must prove before the tribunal will grant such an order.<sup>121</sup> Parties may however need to approach the court to recognize and enforce this order of the tribunal,<sup>122</sup> which the courts of course have the right and discretion to either allow or refuse.<sup>123</sup>

Under the new Model Law, courts also have the power to issue any of the aforementioned interim orders. According to *Article 17J*, “a court shall have the same power of issuing an interim measure in relation to arbitration proceedings...” Parties therefore have the choice between approaching the tribunal or the courts. However, as Professor Bantekas noted, only the courts have the power to issue enforceable orders.<sup>124</sup> Approaching the court as a first resort may therefore be a more reasonable option, especially when the dispute between parties is contentious.<sup>125</sup> For example, a respondent may be reluctant to abide by an order of the tribunal to freeze his assets, possibly because of the implication(s) which such an order may have on his business. In situations like the aforementioned, the coercive powers of the court may be needed to enforce such an order of the tribunal. In other words, rather than go through a two pronged application process, which will involve applying to the tribunal for an interim order and then applying to the court for a subsequent recognition and enforcement order, the more efficient approach may be to approach the court from the onset. On the other hand, a respondent may be indifferent to an order to maintain status quo to the extent that the order does not affect the smooth running of his business.

One may also argue that another advantage of *Article 17J of the UNCITRAL Model Law* is the fact that it is able to provide interim relief for situations arising before the appointment of the arbitration tribunal. Having in mind that one of the major preoccupations of the Model Law was to provide a law that reduces the involvement

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<sup>120</sup> Revised Model Law 2006, article 17(2).

<sup>121</sup> *ibid* article 17A.

<sup>122</sup> *ibid* article 17H (3).

<sup>123</sup> *ibid* article 17I (1).

<sup>124</sup> Ilias Bantekas, *An Introduction to International Arbitration* (Cambridge University Press 2015) 155.

<sup>125</sup> Revised Model Law 2006, article 17H (3).



of the court in arbitration proceedings, institutional rules like the ICC, LCIA and the SIAC<sup>126</sup> provide a useful alternative through the provision of an emergency arbitrator, who by virtue of his position (and pending the appointment of the substantive panel), is able to make interim and/or conservatory orders.<sup>127</sup> As Edgardo Munoz rightly noted, the emergency arbitrator provision was aimed at responding to parties demand to have the choice to avoid approaching State courts.<sup>128</sup>

Baruch Baigel also argues that the emergency arbitrator provision provides parties with a quicker method of dealing with initial problems than the courts.<sup>129</sup> This writer however asserts that this may not necessarily be true in all instances. For example, the process of appointing an emergency arbitrator may in fact be more time consuming than anticipated, especially when there is no express agreement to appoint one and/or when one of the parties is hell bent on frustrating this process by all means. Furthermore, more time may also be wasted if after an interim award delivered by the emergency arbitrator, one of the parties refuses to abide by the award and the interim award creditor has to still approach the court for an enforcement order.

As we eventually submit in Chapter Seven, while the emergency arbitrator provision may in fact be a useful addition to the practice of international arbitration, the extra and unplanned expenses incurred by parties may in fact be a big downside of this innovative provision, especially in domestic arbitration and in a developing country as Nigeria. Having this in mind, one may argue that the ability of courts to make initial interim orders should remain a part, indeed the default provision in domestic arbitration. In other words, unless parties expressly allow the emergency arbitrator provision or by implication incorporate this provision by conducting their arbitration under the auspices of institutions like the ICC and LCIA, who have embedded the practice within their Rules, the court ought to by default be seised of the jurisdiction

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<sup>126</sup> See Article 29 of the ICC Arbitration Rules 2012, Article 9B of the LCIA Rules as well as Schedule 1 of the SIAC Rules.

<sup>127</sup> Sir Vivian Ramsey, 'National Courts and Arbitration: Collaboration or Competition? The Courts as Competitors of Arbitration' (2015) 81(4) *Arbitration* 446, 449.

<sup>128</sup> Edgardo Munoz, 'How Urgent Shall an Emergency Be- The Standards Required to Grant Urgent Relief by Emergency Arbitrators' (2015) 4 *Yearbook on International Arbitration* 43, 46.

<sup>129</sup> Baruch Baigel, 'The Emergency Arbitrator Procedure under the 2012 ICC Rules: A Juridical Analysis' (2014) 31 (1) *Journal of International Arbitration* 1, 17.

to grant any order needed before the constitution of the tribunal. However, for disputes arising after the constitution of the tribunal, it is submitted that this again ought to be dependent on parties express or implied agreement. We discuss this issue in more detail in Chapter Seven of this thesis.<sup>130</sup>

## **4.0 THE DOMESTIC ARBITRATION PRACTICE IN ENGLAND**

### **4.1 Background**

The English Arbitration Act 1996 (“the English Act”)<sup>131</sup> has to a large extent contributed to the development of arbitration all over the world.<sup>132</sup> Prior to this Act, the Departmental Advisory Committee (DAC) under the Chairmanship of Lord Mustill had advocated against adopting the UNCITRAL Model Law, and had instead advocated for a new and more improved English Arbitration Act.<sup>133</sup>

Commenting on the English Act, Paul Newman pointed out that “the promoters of the new English legislation decided that although the UNCITRAL Model Law had many useful lessons, English law and practice were too well developed by case law precedents to justify the whole scale adoption of the Model Law. The exercise became one of consolidating the Arbitration Acts 1950-1979, modernising their language and inserting apposite features from the Model Law”.<sup>134</sup> As Tobi Landau rightly noted, the promoters of the Act were more interested in devising a regime that satisfied common needs and interests as against one that catered solely for one particular type of arbitration at the expense of the other.<sup>135</sup>

Looking at the reform process in retrospect, Alan Reid rightly opined that if indeed England was to preserve its pre-eminent place in the world of arbitration, any amendment to the English arbitration legislation had to be in line with developments

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<sup>130</sup> See Section 4.1.4 of Chapter Seven.

<sup>131</sup> The Act came into force on the 17<sup>th</sup> of June 1996.

<sup>132</sup> One of the aims of this Act was to consolidate English law on arbitration into one coherent statute. See Ozlem Susler, ‘The English Approach to Competence-Competence’ (2013) 13 *Pepperdine Dispute Resolution Law Journal* 427, 430.

<sup>133</sup> The DAC made this recommendation in 1989. It took about six and half years for them to come up with an acceptable model.

<sup>134</sup> Paul Newman, *Alternative Dispute Resolution* (CLT Professional Publishing Ltd 1999) 3.

<sup>135</sup> Tobi Landau, ‘The Effect of the New English Arbitration Act on Institutional Arbitration’ (1996) 13(4) *Journal of International Arbitration* 113, 117.

within the field of international commercial arbitration and to which the Model Law provided the most acceptable model.<sup>136</sup> In coming up with the English Arbitration Act 1996 therefore, the DAC also took into consideration, provisions of the Model Law.<sup>137</sup>

England remains a preferred arbitration destination not only because of the quality of her arbitration law, but also because of her historical and political influence, her optimal geographical location as well as her developed legal and court system.<sup>138</sup> In fact, according to Paolo Esposito, "...English law and the Judges who administer it are so highly regarded that the cases heard in the commercial court in recent years saw an approximate 50:50 split between English and foreign litigants...".<sup>139</sup> It has therefore proven to be a popular middle ground for international businesses.

#### **4.2 A Critical Analysis of the English Arbitration Act 1996**

*Section 1 of the English Act* clearly defines its underlying principles: to provide a fair, speedy and reasonably priced dispute resolution process, to allow parties determine the process and method by which their disputes will be resolved (subject to public interest issues) and finally to oust the jurisdiction of the courts from issues relating to arbitration (except in matters allowed by the Act).<sup>140</sup> Tobi Landau submitted that "Section 1...directs that the provisions of the Act be interpreted purposively. Whenever any section leaves room for doubt on interpretation, reference must be made back to these principles, rather than embarking on a cold textual analysis of specific provisions in the abstract".<sup>141</sup> This section in other words provides a preamble to the Act and serves as a standard against which aspects of an English arbitration proceeding can be measured or evaluated.

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<sup>136</sup> Alan Reid, 'The UNCITRAL Model Law on International Commercial Arbitration and the English Arbitration Act: Are the Two Systems Poles Apart?' (2004) 21(3) *Journal of International Arbitration* 227, 229.

<sup>137</sup> Lord Hacking, 'Arbitration Law Reform: The Import of the UNCITRAL Model Law on the English Arbitration Act 1996' (1997) 63(4) 291, 294.

<sup>138</sup> Reuben Clark and Dieter G. Lange, 'Recent Changes in English Arbitration Practice Widen Opportunities for More Effective International Arbitration' (1979-1980) 35 *Business Law* 1621, 1623.

<sup>139</sup> Paolo Esposito, 'The Development of Commercial Law through Case Law: Is Section 69 of the English Arbitration Act 1996 Stifling Progress' (2008) 74(4) *Arbitration* 429, 432.

<sup>140</sup> Section 1(a)-(c) of the English Arbitration Act 1996.

<sup>141</sup> Tobi Landau, 'United Kingdom: Arbitration Act of 1996' (1997) 36(1) *International Legal Materials* 155, 156.

The English Act requires that an arbitration agreement be in writing.<sup>142</sup> In a developed jurisdiction like the United Kingdom (and unlike jurisdictions like Nigeria and Ghana), this writing requirement is not an unreasonable demand. In *American Design Associates v DIA*,<sup>143</sup> the court held that clear words were needed to show the existence of an arbitration agreement.<sup>144</sup> The English courts have however held that the agreement need not contain the word “arbitration” for it to be valid.<sup>145</sup> In another English case, it was held that an agreement to submit to arbitration can be inferred from parties’ intention to submit their dispute to an individual for a binding decision. This intention will be established from a reasonable man’s point of view.<sup>146</sup> Where the validity of an agreement is in question, the approach of the English court is to determine the validity of the agreement through the lens of the putative law, which like we have said, is the law which would have governed the arbitration agreement were it valid.

Parties have the autonomy to determine certain aspects of their arbitration.<sup>147</sup> This is however subject to a limited amount of judicial intervention needed to safeguard public interest.<sup>148</sup> Georgios Zekos noted that “the court is regarded as the means of safe guarding and avoiding denial of justice in accordance with the definition and interpretation of public interest”.<sup>149</sup> The English Act also stipulates certain mandatory provisions, which are to take effect notwithstanding parties’ intention and agreement.<sup>150</sup> This implies that the mandatory rules contained in the English Act cannot even be displaced by institutional rules like those of the ICC and the LCIA.<sup>151</sup>

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<sup>142</sup> Section 6(2) of the English Arbitration Act 1996.

<sup>143</sup> (2000) All ER (D) 1756.

<sup>144</sup> It should be pointed out that oral agreements remain valid under English common law. See Section 81(1) (b) of the English Arbitration Act 1996.

<sup>145</sup> *David Wilson Homes v Survey Service Limited* (2001) EWCA Civ 34.

<sup>146</sup> *Pagnan Spa v Feed Products* (1987) 2 Lloyds Rep 50.

<sup>147</sup> English Arbitration Act 1996, section 15(1).

<sup>148</sup> *ibid* section 1.

<sup>149</sup> Georgios Zekos, ‘The Role of Courts in Commercial and Maritime Arbitration Under English Law’ (1998) 15(1) *Journal of International Arbitration* 51, 61.

<sup>150</sup> English Arbitration Act 1996, section 4. The mandatory provisions are contained in Schedule 1 of the Act.

<sup>151</sup> Georgios Zekos (n 149) 51.

Mandatory provisions should be contrasted with default provisions. According to Toby Landau, “default provisions are set out in order to fill gaps and ensure that an arbitration runs smoothly where the parties have not so agreed (the reality being, of course that once a dispute has arisen, it is very likely that parties will be unable to agree on anything).”<sup>152</sup> The DAC Committee in justifying the introduction of these special provisions submitted that “in general, the mandatory provisions are there in order to support and assist the arbitral process...” The introduction of these mandatory provisions is a fundamental difference between the English Act and the Model Law (as well as the other frameworks under consideration in this chapter).<sup>153</sup>

*Section 9 of the English Arbitration Act* also incorporates the stay of proceedings provision found in all the arbitration frameworks.<sup>154</sup> *Section 9 (4) of the Act* provides that “on an application (for stay of proceedings) under this section, the court shall grant a stay unless satisfied that the arbitration agreement is null and void, inoperative or incapable of being performed” (Phrase in bracket mine). This section by implication mandates the court to confirm not only that the arbitration is valid but also that it is capable of being performed, before staying it and referring it to arbitration.<sup>155</sup> If the court has confirmed that there is a valid and legally binding arbitration agreement which is capable of being performed, what then is the purpose of keeping the court case alive?<sup>156</sup> Admittedly, it is possible to argue that an order of stay of proceeding is a safer approach especially since the existence of the court proceeding does not in any way affect the continuation of the arbitration and that it may be useful in case the decision is later reversed.

Not every dispute in England is arbitrable. Unfortunately, the Act does not expressly define what is or is not arbitrable in England except to the extent that *Section 1(b) of the*

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<sup>152</sup> Toby Landau, ‘The Effect of the New English Arbitration Act on Institutional Arbitration’ (1996) 13(4) *Journal of International Arbitration* 113, 166.

<sup>153</sup> John Townsend, ‘Foreign Laws and Uniformity in English Arbitration; *Fiona Trust v Privalov*’ (2009) 14 *Uniform Law Review* 555, 568.

<sup>154</sup> In Section 5.5 of Chapter Four of this thesis, we argued against the idea of using an order of stay of proceeding as a solution to a litigation proceeding brought in breach of an arbitration agreement.

<sup>155</sup> Hong-Lin Yu, ‘Five Years On: A Review of the English Arbitration Act 1996’ (2002) 10(3) *Journal of International Arbitration* 209, 213.

<sup>156</sup> We make a similar argument in Section 5.5 of Chapter Four.

Act allows parties to determine the method by which their dispute will be administered (subject only to such safeguards as are necessary in the public interest). Section 6(1) of the Act also provides that both contractual and non-contractual matters are capable of being administered via arbitration. Furthermore, Section 81(1) (a) of the Act allows all arbitrable subject matters under Common Law to be administered under the Act. By implication of these sections, a multitude of non-contractual claims (including claims in tort, disputes involving competition law matters, disputes concerning intellectual property rights and certain statutory claims) are capable of settlement by arbitration. Generally, criminal matters and employment related matters are good examples of matters that are not arbitrable under English law.<sup>157</sup>

English law recognizes the doctrine of separability.<sup>158</sup> Lord Steyn in *Lesotho Highlands Development Authority v Impregilo Spa*, opined that the doctrine “is part of the very alphabet of arbitration law”.<sup>159</sup> Like many other jurisdictions,<sup>160</sup> the doctrine of separability in England suffered a chequered history.<sup>161</sup> According to Adam Samuel, originally there used to be two main schools of thought on this issue; the one contract theory and collateral contract theory.<sup>162</sup> While the former assumes that the contract and arbitration agreements are one and should therefore be governed by the law governing the contract, the latter holds that the arbitration clause is a separate

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<sup>157</sup> *Clyde & Co LLP v. Bates Van Winkelhal* (2011) EWHC 668(QB)

<sup>158</sup> Section 7 of the English Arbitration Act 1996.

<sup>159</sup> (2005) UKHL 43.

<sup>160</sup> We discuss this principle in more detail in Section 2.1.2 of Chapter Seven of this thesis.

<sup>161</sup> Mark McNeill, ‘Doctrine of Separability and Consent to Arbitration’ (2008) 24(3) *Arbitration International* 475; Adam Samuel, ‘Separability in English Law- Should an Arbitration Clause be regarded as an agreement separate and collateral to a contract in which it is contained?’ (1986) 3(3) *Journal of International Arbitration* 95; Adam Samuel, ‘Separability and Construing Arbitration Clauses: The House of Lords Decision in *Premium Nafta* and the *Fiona Trust*’ (2008) 24(3) *Arbitration International* 489; Peter Gross, ‘Separability Comes of Age in England: *Harbour v Kansa* and Clause 3 of the Draft Bill’ (1995) 11(1) *Arbitration International* 85; Phillip Landolt, ‘The Inconvenience of Principle: Separability and Kompetenz-Kompetenz’ (2013) 30(5) *Journal of International Arbitration* 511; Carl M. Svernlöv, ‘The Evolution of the Doctrine of Separability in England: Now Virtually Complete? The Doctrines of Separability of the Arbitration Agreement and Competence de la Competence’ (1992) 9(3) *Journal of International Arbitration* 115; Joachim Delaney and Katharina Lewis, ‘The Presumptive Approach to the Construction of Arbitration Agreements and The Principle of Separability-English Law Post *Fiona Trust* and Australian Law Contrasted’ (2008) 3 *U.N.S.W.L.J.*, 341.

<sup>162</sup> Adam Samuel, ‘Separability in English Law- Should an Arbitration Clause be regarded as an agreement separate and collateral to a contract in which it is contained?’ (1986) 3(3) *Journal of International Arbitration* 95, 98.

agreement collateral to the main contract. The separability doctrine has developed from a time when its existence was in doubt, to one where it is now established.<sup>163</sup>

Even though the separability doctrine was reaffirmed in *Heyman V Darwin*,<sup>164</sup> Viscount Simon made obiter statements which suggested that any dispute relating to the existence and validity of the head contract (that is, the contract containing the arbitration clause), cannot be subject to arbitration. In his opinion, the party denying the existence of the contract is also denying that he submitted to arbitration and so the alleged invalidity of the contract also affects the validity of the arbitration agreement. Subsequent decisions seemed to follow the Viscount Simons approach.<sup>165</sup>

The shift however began in *Harbour Assurance v Kansa General International Insurance*,<sup>166</sup> where all three Judges held that as long as the arbitration clause is not directly impeached, an arbitration clause is as a matter of law capable of surviving the invalidity of the contract, so that the arbitrator has jurisdiction to determine the initial invalidity of the contract. The aforementioned decision was reaffirmed in the case of *Fiona Trust v Privalov*,<sup>167</sup> where the head contract was allegedly procured by fraud. The English Court held that the construction of an arbitration clause should start from the assumption that the parties as rational businessmen were likely to have intended that any dispute arising out of their relationship, including a dispute on the validity of the contract, should be resolved by arbitration unless the language of the agreement suggested otherwise. In the said case, the arbitration agreement did not contain anything that excluded any question relating to the validity of the contract. Accordingly, the court held that an arbitral tribunal was able to entertain the allegation of fraud surrounding the head contract. The implication of this decision in summary is that the arbitration agreement itself must be directly impeached before it can be held to be invalid by an English court.<sup>168</sup>

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<sup>163</sup> See *Fiona Trust v. Privalov* (2007) UKHL 40.

<sup>164</sup> [1942] 1 All ER 337.

<sup>165</sup> *Dalmia Dairy Industries v National Bank of Pakistan* (1978) 2 Lloyd's Rep 223 and *Ashville Investments Ltd v Elmers Contractors Ltd* (1988) 2 All ER 577

<sup>166</sup> [1993] 1 Lloyd's Rep. 455

<sup>167</sup> (2007) UKHL 40

<sup>168</sup> T.D Grant, 'International Arbitration and English Courts' (2007) 56(4) The International and Comparative Law Quarterly 871,873.

The doctrine of separability has since been incorporated in the English Arbitration Act 1996. *Section 7 of the English Act* provides that “an arbitration agreement which forms or was intended to form part of another agreement (whether or not in writing) shall not be regarded as invalid, non-existence or ineffective because that other agreement is invalid, or did not come into existence or has become ineffective, and it shall for that purpose be treated as a distinct agreement (emphasis mine).” From the foregoing, a debatable interpretation of the aforementioned section is that, unless there is a controversy as to the validity of the head contract, the arbitration agreement is for all intents and purposes a part of the head contract. In order to avoid any argument or controversial interpretation, the English legislature will do well to clearly enunciate the doctrine in any subsequent arbitration Act.<sup>169</sup> We examine the doctrine of separability in more detail in Chapter Seven of this thesis.<sup>170</sup>

As many other jurisdictions, the English Act empowers the arbitration tribunal to rule on its substantive jurisdiction. In other words, the Act incorporates the competence competence doctrine into the English framework.<sup>171</sup> According to Richard Reuben, this doctrine “refers generally to the independent authority of the arbitrator to decide the limits of his or her own jurisdiction”.<sup>172</sup> Jack Tsen-Ta Lee rightly submitted that the doctrine “is best seen as a rule of convenience designed to reduce unmeritorious challenges to an arbitrator’s jurisdiction”.<sup>173</sup> Carl Svernlöv also justified the doctrine when he opines that competence like separability, was instituted to prevent bad faith attempts by parties to delay or obstruct the arbitral proceeding through unnecessary applications to the court.<sup>174</sup>

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<sup>169</sup> As we will see in the final part of this thesis, the Uniform Act on Arbitration of the OHADA Treaty provides a useful separability model provision for the English Arbitration Act. See Section 4.2 of this Chapter for more discussion on this issue.

<sup>170</sup> The question of choice of law is closely related to the doctrine of separability. This arises where the head contract and the arbitration agreement contain two different laws. This discussion on choice of law is related to international arbitration and so therefore beyond the purview of this thesis.

<sup>171</sup> English Arbitration Act 1996, section 30.

<sup>172</sup> Richard C. Reuben, ‘First Options, Consent to Arbitration and the Demise of Separability: Restoring Access to Justice For Contracts with Arbitration Provisions’ (2003) 56 SMU Law Review 819, 836.

<sup>173</sup> Jack Tsen – Ta Lee, ‘Separability, Competence Competence and the Arbitrators Jurisdiction in Singapore’ (1995) 7 Singapore Academy of Law Journal 421, 424.

<sup>174</sup> Carl M. Svernlöv, “The Evolution of the Doctrine of Separability in England: Now Virtually Complete? The Doctrines of Separability of the Arbitration Agreement” and Competence de la Competence’ (1992) 9(3) Journal of International Arbitration 115.



The English Act does well by properly defining the scope of the competence doctrine. According to *Section 30(1)(a)-(c) of the said Act*, questions relating to the substantive jurisdiction of the tribunal include whether there is a valid arbitration agreement, whether the tribunal is properly constituted and finally, what matters have been submitted to arbitration in accordance with the arbitration agreements.

However, unlike the Model Law and the Nigerian Arbitration Act, the ability of the tribunal to determine the scope of its own jurisdiction is subject to judicial control.<sup>175</sup> For example, *Section 67(1) of the English Act* provides that “a party to arbitral proceedings may (upon notice to the other parties and to the tribunal) apply to the court...challenging any award of the arbitral tribunal as to its substantive jurisdiction”.<sup>176</sup> Alan Reid argues that this provision “reflects the English legal system’s reluctance to accept complete exclusion of the court’s inherent jurisdiction”.<sup>177</sup> We discuss the extent to which judicial intervention is justifiable later.

The English Act also shows its superiority and perhaps its practicality by not only differing from the Model Law in a number of regards, but very importantly by pioneering certain provisions within the sphere of arbitration. Earlier on, we made reference to some of the considerations that influenced the United Kingdom in the process of coming up with its own framework. Notwithstanding any undertones which may have influenced the decision of the United Kingdom to introduce a slightly different law, one must acknowledge the fact that by declining to wholly adopt the Model Law, they have contributed to the debate and practice of arbitration in general.

For example, the English Act introduced an extension of time provision, which allows parties who are not able to initiate proceedings within the specified period of time, to

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<sup>175</sup> For a detailed discussion on this doctrine of competence competence, see Peter Gross, ‘Competence of Competence: An English View’ (1992) 8(2) *Arbitration International* 205; P. Schlosser, ‘The Competence of Arbitrators and of Courts’ (1992) 8 *Arbitration International* 189; Francisco Gonzalez De Cossio, ‘The Competence Principle, Revisited’ (2007) 24(3) *Journal of International Arbitration* 231; Phillip Landolt, ‘The Inconvenience of Principle: Separability and Kompetenz-Kompetenz’ (2013) 30(5) *Journal of International Arbitration* 511; Carl M. Svernlöv (n 172); Mahir Jalili, ‘Kompetenz-Kompetenz: Recent U.S and U.K Developments’ (1996) 13(4) *Journal of International Arbitration* 169, 171; Janet A. Rosen (n 103).

<sup>176</sup> See also Section 32 of the English Arbitration Act 1996.

<sup>177</sup> Alan Reid (n 136) 229.

apply for an order of the court extending the time to commence their arbitration proceeding.<sup>178</sup> The court is only expected to issue the said order if it is satisfied that the circumstances are such as were outside the reasonable contemplation of the parties when they agreed to the provision in question or that the conduct of one party makes it unjust to hold the other party to the strict terms of the provision in question.<sup>179</sup> In *Vosnoc v Transglobal Projects*,<sup>180</sup> the court refused an application seeking a declaration that a notice which merely informed the respondent of an intention to refer a dispute to arbitration was enough to signify the commencement of an arbitration. The court however granted an extension of time application because it was satisfied that the circumstances were outside the reasonable contemplation of the parties. This section of the English Act does not however affect the application of the Limitation Act.<sup>181</sup>

This extension of time provision of the Act was most definitely influenced by the civil procedure practice of the courts in many jurisdictions. For example, *Article 3.1 of the English Civil Procedure Rules* empowers courts to extend the time within which a party to a litigation proceeding may take certain steps.<sup>182</sup> The Rules of the Federal High Court of Nigeria also empower a Judge to “as often as he deems fit and either before or after the expiration of the time appointed by these or by any judgement or order of the court, extend or adjourn the time for doing any act or taking any proceeding.”<sup>183</sup> In *Nipol Limited v Bioku Investment*,<sup>184</sup> the Nigerian Supreme Court stated that this power was mainly to prevent injustice to the parties and must never be granted *suo motu*.

Interestingly, the Model Law does not make any such provision. Even though one could argue that *Section 36 of the Nigerian Arbitration Act* makes similar provisions to the extension of time provision in England, a distinction must be made between the provision of the English Act and the Nigerian Act in this respect. *Section 36 of the*

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<sup>178</sup> English Arbitration Act 1996, section 13(1).

<sup>179</sup> *ibid* section 12(3).

<sup>180</sup> (1998) 3 All ER 714.

<sup>181</sup> English Arbitration Act 1996, section 12(5).

<sup>182</sup> Civil Procedure Rules 1998 No 3132 (L17), article 3.1.

<sup>183</sup> Federal High Court Civil Procedure Rules 2009, section 48(4).

<sup>184</sup> (1992 4 SCNJ 58).

*Nigerian Arbitration Act* allows a tribunal to extend the time specified for the performance of any act under the Act. However, while the Nigerian framework contemplates a proceeding that has already been initiated (because the presence of an arbitrator implies an existing proceeding), *Section 12 of the English Act* obviously contemplates a situation where there is no pre-existing proceeding and a party to an arbitration agreement has failed to meet a pre-agreed commencement timeline or procedure.

The question then is; what options are open to a party in Nigeria who fails to commence proceedings within a pre-agreed timeline? Of course parties always have the option to vary their agreement but what if the other party refuses to shift ground, can the courts under the UNCITRAL or in Nigeria extend the time?

It is the position of this writer that under the UNCITRAL Model Law and in jurisdictions like Nigeria, the courts are unable to entertain extension of time applications. *Article 5 of the Model Law*, *Section 6 of the ADR Act* and *Section 4 and 5 of the Nigerian Act* clearly tie the hands of the court in such situations. The Model Law for example provides that “in matters governed by this Law, no court shall intervene except where so provided in this Law”.<sup>185</sup> In other words, the court has no powers outside the scope delineated by law. It is ironic that one of the sections inserted to prevent courts from tampering with parties’ choice of arbitration, makes it impossible for the court to save the very same arbitration in this instance.

For extension of time applications arising during the course of the proceedings, English courts are also able to extend the time required to act.<sup>186</sup> However, according to *Section 79 (3) of the English Act*, the court is only able to step in after parties have exhausted any other available recourse to the tribunal or to any arbitral (or other) institution or person that parties had previously agreed will exercise such powers. The court must also be convinced that substantial injustice would be done if it does not step in. *Section 50 of the English Act* also empowers the court to extend the time within which the tribunal should make its award upon an application by either the tribunal

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<sup>185</sup> Revised Model Law 2006; article 5.

<sup>186</sup> English Arbitration Act 1996, section 79.

or any of the parties. The court is only to issue such an order where it is apparent that substantial injustice will otherwise be done.<sup>187</sup>

In terms of the composition of the arbitral tribunal, all the frameworks under consideration differ. While the Nigerian Arbitration Act, the Ghanaian framework and the UNCITRAL Model Law prescribe a default number of three arbitrators,<sup>188</sup> the English Arbitration Act provides for a default number of one arbitrator.<sup>189</sup> In Chapter Three, we pointed out that one of the widely acknowledged disadvantages of arbitration as against the litigation process is the high cost of conducting arbitration proceedings. Arbitrators' fees are known to constitute a substantial part of arbitration expenses. The Model Law fails in this regard, knowing fully well that it provides a model not only for thriving economies but also for developing economies like Nigeria. A one-arbitrator tribunal will definitely go a long way in reducing the cost of arbitration. Unfortunately, a country like Nigeria, which still battles with high levels of poverty and unemployment, chose to incorporate the Model Law's default number of three.

The English Act also creates the position of the chairman or umpire for the tribunal. There is no mention of either of these positions in the Model Law and the Nigerian Arbitration and Conciliation Act. Just like the English Arbitration Act,<sup>190</sup> the Ghanaian Act provides for the position of a chairman in the case of a three-person tribunal and provides a transparent method of appointing the chairman; the arbitrators nominated by the parties appoint a third arbitrator who will serve as chairman.<sup>191</sup> This is a codification of the usual practice in international commercial arbitration.

Unlike the Ghanaian Act, the English Act does not expressly prohibit even numbered tribunals, even though it seems to discourage it. *Section 15(2) of the English Act* provides that "unless otherwise agreed by the parties, an agreement that the number

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<sup>187</sup> *ibid* section 50(3).

<sup>188</sup> Nigerian Arbitration and Conciliation Act, section 6(1); Ghanaian ADR Act 2010, section 13(2); Revised Model Law 2006, article 10(2).

<sup>189</sup> The Ghanaian framework goes a step further to prohibit an even numbered tribunal; See Ghanaian ADR Act 2010, section 13(1).

<sup>190</sup> English Arbitration Act 1996, section 16(5)(b).

<sup>191</sup> Ghanaian ADR Act 2010, section 14(2)(b).

of arbitrators shall be two or any other even number shall be understood as requiring the appointment of an additional arbitrator as chairman of the tribunal.” This in other words allows parties to actually appoint an even numbered tribunal, thus giving room for confusion especially when read against some sections of the Act. For example, *Section 20 (3) of the Act* provides that decisions shall be made by all or a majority of the arbitrators, which includes the chairman. *Subsection 4* goes ahead to provide that the view of the chairman shall prevail where there is neither unanimity nor a majority. Interestingly, the English Act does not rule out the possibility of a chairman in an even numbered tribunal. While it may arguably be acceptable to suggest that *subsection 4* provides a ready solution to a lack of majority arising in a four (4) man tribunal, it is clearly unacceptable to suggest that the chairman’s view will hold sway in a two-person tribunal as it definitely defeats the purpose of appointing and paying for the services of a second arbitrator. The English Act will do well to either toe the line of the Ghanaian Act, which is arguably a more improved version of the English Act (at least in this regard) by prohibiting even numbered tribunals, or on the alternative by devising some other means of breaking a deadlock in a two-person tribunal apart from through the decision of the chairman. Redfern and Hunter rightly noted however that there is a need especially in highly contentious disputes, to have someone who can take the lead within the arbitral tribunal.<sup>192</sup>

When the pre-agreed appointment process fails, all the arbitration frameworks under consideration provide for a resort to the court. However, while the Model Law<sup>193</sup> and the Nigerian Act<sup>194</sup> seem to give courts a free hand (subject of course to qualifications pre-agreed by the parties), the English and the Ghanaian Acts clearly define (and rightly so) the powers of the court in this instance.<sup>195</sup> *Section 18(3) of the English Arbitration Act* allows the court to make any necessary appointment, revoke any appointment already made,<sup>196</sup> direct that the tribunal shall be constituted by such

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<sup>192</sup>Nigel Blackaby et al (n 51) 238.

<sup>193</sup> Revised Model Law 2006, article 11(4).

<sup>194</sup> Nigerian Arbitration and Conciliation Act, section 7(3).

<sup>195</sup> Revised Model Law 2006, article 11(5); Nigerian Arbitration and Conciliation Act, section 7(5).

<sup>196</sup> The English Act makes a distinction between the courts power to remove an arbitrator generally under Section 24 of the English Act and the courts power to revoke the appointment of an arbitrator.

appointment (or any one or more of them) as have been made and to give directions as to the making of any necessary appointment. Furthermore, the English Act rightly gives room for an appeal but only subject to the leave of the court.<sup>197</sup> Unfortunately, the Model Law does not give parties the right to appeal this decision of the court.<sup>198</sup>

It should be recalled that in Chapter Three, this writer criticised the well-established arbitration custom which allows parties to nominate their arbitrator (in a three-person tribunal). We mentioned that the practice enables parties (or their counsel) to go “forum shopping” to select an arbitrator who holds a view that is sympathetic to their case. We concluded by submitting that parties are able to circumvent the ends of “justice” by selecting an arbitrator who may be sympathetic to their case and not necessarily one that will be fair and just.<sup>199</sup>

Even though not entirely satisfactory, the above mentioned position in England and Ghana possibly strikes this balance, since it allows parties to appoint their arbitrator while at the same time allowing the introduction of an independent third party, who by presiding over the proceeding neutralizes any element of bias that may arise.

Under the English Arbitration Act, the arbitrator is immune from liability for any action or omission arising in the course of his work as an arbitrator, except same is done in bad faith.<sup>200</sup> The English provision allows an arbitrator to perform his duties without any threat and harassment while at the same time providing a check on any arbitrator with unscrupulous tendencies, by introducing the bad faith bit. The Act by this section provides a good balance: on one side is the need to allow the arbitrator do their work without undue threat and harassment, on the other hand is the need to protect parties from unscrupulous arbitrators.<sup>201</sup> Unfortunately, the Model Law and the Nigerian Act make no such provision.

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The latter which is provided for in section 18(3)(c) of the English Act is exercisable only when the appointment procedure agreed upon by the parties fails.

<sup>197</sup> English Arbitration Act 1996, section 18(5).

<sup>198</sup> Revised Model Law 2006, article 11(4).

<sup>199</sup> A good example of this can be seen in *Locabail v Bayfield Properties* (2000) QB 451, which involved an insurance company.

<sup>200</sup> English Arbitration Act 1996, section 29(1).

<sup>201</sup> Hong-Lin Yu (n 155) 213.

The issue of consolidation of arbitration proceedings is another laudable innovation of the English Arbitration Act.<sup>202</sup> The increase in commercial relationships and activities has also brought with it an increase in the number of multi-tiered contracts, each containing its own arbitration agreement. Taking into consideration the fact that consent is key to the validity of any arbitration agreement, there was the problem of how to reconcile or compress all the arbitration agreements or proceedings into one, in order to save cost and avoid conflicting decisions.<sup>203</sup> The lack of a consolidation option was definitely a disadvantage of the arbitration practice especially as against the litigation process. Generally, courts are able to consolidate proceedings on similar subject matters. By and large, a consolidation order is granted when two or more matters are pending in the court and it either appears that they involve same questions of law or fact or where the reliefs being claimed are in respect of or arise out of the same or similar transaction or series of transactions.<sup>204</sup> A consolidation of actions which do not have incidents of common law or fact or are not based on the same issues or do not relate to the same transaction, is bound to lead to intractable confusion and perhaps an exercise in futility.<sup>205</sup> A consolidation order is essentially for the convenience of the parties who are saved both the time and cost of a repeated and contentious action in cases involving common issues, reliefs or parties.

Ironically, the UNCITRAL Model Law, which was put into place to cater for international commercial disputes, many of which are usually multi-tiered and will no doubt benefit from a consolidation order, makes no room for this. *Section 35 of the English Act* allows parties to consolidate existing proceedings. One important distinction between consolidation under the English Arbitration Act and in litigation, is that an arbitration tribunal is unable to coerce parties into consolidating arbitration proceedings. This is of course in view of the fundamental nature of parties' consent.

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<sup>202</sup> See Section 35 of the English Arbitration Act 1996.

<sup>203</sup> Even though this issue of multi-tiered contracts is applicable in domestic disputes, it is more applicable in international commercial disputes.

<sup>204</sup> See the English case of *C.F. Booth Ltd v. Revenue and Custom Commissioner* (2015) UKFTT 407 (TC); See also the Federal High Court of Nigeria (Civil Procedure) Rules 2009, order 11.

<sup>205</sup> See the English case of *Ixis Corporate and Investment Bank v Westlb AG* (2007) EWHC 1748 (Comm); See also the Nigerian case of *Jonathan Enigwe & 7 ors v Michael Akaigwe & 8 ors* (1992) 2 SCNJ (Pt II) 316.

Another unique feature of the English Arbitration Act as against the other frameworks is the fact that courts in specific situations are also able to entertain preliminary points on jurisdiction.<sup>206</sup> As many other provisions in the English Act, this provision balances the idea of curtailing the involvement of the courts in arbitration proceedings, with the need to protect the rights of parties. *Section 32 of the English Act* allows the court to administer issues relating to jurisdiction with the agreement of all the parties to the proceeding or with the permission of the tribunal. In the case of the latter, the court is mandated to ensure that the determination of the question is likely to produce substantial savings in cost, that the application was made without delay and there is good reason why the matter should be decided by the court.

Compared to the other frameworks, the English Act seems to increase the involvement of the court in the arbitration process. Johan Steyn opined that under English law, courts have both auxiliary<sup>207</sup> and supervisory powers<sup>208</sup> by virtue of the English Arbitration Act.<sup>209</sup> Commentators have however criticised the involvement of the court in arbitration. For example, Alan Reid has argued that judicial intervention is the antithesis of arbitration. He opined that rather than advocate for judicial intervention, increasing the professionalism of arbitrators through education and training is a better solution.<sup>210</sup>

This writer however contends that judicial intervention in limited and statutorily defined instances as in the English Act, is not necessarily antithetical but may in fact provide a support mechanism to the arbitration process.<sup>211</sup> The relationship between the court and the tribunal can be compared to a relay race with the panel and the court passing batons to each other, all in a bid to achieve parties' wishes.<sup>212</sup>

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<sup>206</sup> English Arbitration Act, section 32.

<sup>207</sup> See for example, Section 42 of the English Arbitration Act 1996 which empowers courts to make an order requiring a party to comply with a peremptory order made by the tribunal.

<sup>208</sup> See Section 24 of the English Arbitration Act 1996 which empowers the court to remove an arbitrator under defined circumstances.

<sup>209</sup> Johan Steyn, 'Arbitration and The English Courts' (1982) 47(3) *Arbitration* 162.

<sup>210</sup> Alan Reid (n 136) 236.

<sup>211</sup> Okezie Chukwumerijie, 'Judicial Supervision of Commercial Arbitration: The English Arbitration Act of 1996' (1996) 15(2) *Arbitration International* 171.

<sup>212</sup> Lord Mustill, 'Comments and Conclusions' in *International Chamber of Commerce (ICC) (ed.) Conservatory Provisional Measures in International Arbitration* (9<sup>th</sup> Joint Colloquium, ICC 1993) 118.



Judicial intervention can only be said to be antithetical to arbitration when it seeks to defeat parties' lawful intention to arbitrate their dispute. This is however not the case, at least under the English Arbitration Act. A good example is *Section 24 of the English Act*, which allows the court to remove an arbitrator if for instance his impartiality is in doubt. A partial arbiter will no doubt defeat the intention of parties (or at least one of the parties) for a fair and just process.

In other words, unlike the Model Law<sup>213</sup> and the Nigerian Arbitration Act, where only arbitrators are empowered by statute to deal with such an application,<sup>214</sup> *Section 24 of the English Arbitration Act* gives courts the power to remove an arbitrator but based on very strict and clearly stated conditions. The point being made in this paragraph is that under a properly drafted framework as that of the United Kingdom, the involvement of the court is sometimes necessary and should only be triggered when the arbitration process is seen to be derailing or is as we have previously mentioned, contrary to public policy.

The idea behind the UNCITRAL provision (which is what the Nigerian law is based on) is as we have previously mentioned, to reduce the involvement of the court in arbitration proceedings. The question then is this, using the reasonable man's test, what is the likelihood of an arbiter being unfair on an application challenging his/her own appointment? It is a fundamental principle of administrative law that you cannot be a judge in your own cause.<sup>215</sup> Inasmuch as we are trying to detach arbitration proceedings from the purview of the court, we cannot oust the jurisdiction of the law over arbitration since the latter is a creation of the former. This is where the ingenuity of the English Arbitration Act comes in. *Section 24 of the Act* allows a party to apply to the court to remove the arbitrator. The Ghanaian Act introduces an interesting angle when it allows the tribunal decide such a challenge except where there is a sole arbitrator tribunal in which case parties have the option of either submitting their challenge to the appointing authority or to the courts.<sup>216</sup>

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<sup>213</sup> Revised Model Law 2006, article 13.

<sup>214</sup> Nigerian Arbitration and Conciliation Act, section 9.

<sup>215</sup> In Latin, *Nemo Judex in Causa Sua*.

<sup>216</sup> Ghanaian ADR Act 2010, section 16(3).

When an arbitral award has been delivered, the tribunal ordinarily becomes *functus officio*. Unlike the Model Law, which allows parties to apply to the tribunal to correct clerical or typographical errors in the award<sup>217</sup> as well as to interpret any ambiguous part of the award,<sup>218</sup> the English Act only allows the tribunal to “correct” the award.<sup>219</sup> Alan Reid has rightly noted that the English Arbitration Act approach is the correct one as “in practice...this interpretative power may be abused. A dominant party may browbeat a weaker party into accepting an Article 33(b) interpretative reference that in actual fact is an attempt to re-open the case and substitute the original award with a more beneficial award”.<sup>220</sup> Meanwhile, it is submitted that the English draftsman may in subsequent editions of the Act do well to clarify what “correct an award” in *Section 57(1)* entails, since this can arguably be said to also give the tribunal the power to re-open a case and correct more than just clerical or typographical mistakes.

Other examples of where the English Act gives the court the power to act but within a very strict and defined scope include *Section 68(1) of the said Act*, which allows a party to apply to the court to challenge an award on grounds of serious irregularity which will cause serious injustice. Wendy Miles and Justen Li rightly noted that this mandatory right to challenge the award on the basis of serious irregularity is subject to a very high threshold.<sup>221</sup> *Section 68 (2) of the Act* goes on to list the specific situations that qualify as serious irregularity. This list which appears to be exhaustive<sup>222</sup> must ultimately result into substantial injustice.<sup>223</sup> Justice Cole in *Vee Networks v Econet Wireless Ltd*<sup>224</sup> held that substantial injustice was not necessarily about a wrong conclusion but rather whether the arbitrator adopted an inappropriate means to reach the wrong conclusion. In other words, but for one of the situations listed in *Section 68(2) of the Act*, the tribunal would have reached a different decision.

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<sup>217</sup> Revised Model Law 2006, article 33(a).

<sup>218</sup> *ibid* article 33(b).

<sup>219</sup> English Arbitration Act 1996, section 57.

<sup>220</sup> Alan Reid (n 136) 233.

<sup>221</sup> Wendy Miles and Justin Li, ‘Does England’s Expansive Grounds for Recourse Increase Delays and Interference in Arbitration’ (2014) 80(1) *Arbitration* 35,38.

<sup>222</sup> Robert Merkin, *Arbitration Law* (Abingdon: Informa 2013) Paragraph 20.7.

<sup>223</sup> See the English case of *Egmatra v Marco Trading Corp* (1998) CLC 1552, 1556.

<sup>224</sup> (2004) EWHC 2909 (Comm).

In *Shuttari v Solicitors Indemnity Fund*,<sup>225</sup> an arbitrator who had repeatedly granted adjournments on the application of the plaintiff was held not to have acted irregularly when he refused to grant another application for adjournment made by the plaintiff even though the plaintiff claimed to have needed the time to present medical evidence in support of her case. In arriving at this decision, the Court of Appeal not only took into consideration the fact that the tribunal had in the past given the plaintiff enough time to present her case, all to no avail, but also the fact that the plaintiff had given no indication on the contents and purpose of the said medical report. It was therefore not unreasonable to assume that it was yet another of the plaintiff's delay tactics.

The Act also gives parties the right to appeal an award on points of law.<sup>226</sup> Andrew Tweeddale noted that challenges to an arbitrator's award purely on an error of fact have rarely ever been permitted.<sup>227</sup> Unlike *Section 68*, this is a non-mandatory provision of the law as it is not included within the mandatory schedule.<sup>228</sup> *Section 82(1) of the English Arbitration Act* defines questions of law to mean the law of England and Wales and so an application under *Section 69 of the English Arbitration Act* can only be based on English law.<sup>229</sup> Such an application must be done with the agreement of all the parties or with the leave of court.<sup>230</sup> In other words, parties are allowed to agree to opt out of their right to appeal on issues of points of law. In practice, many parties opt out of this provision of the English Act.<sup>231</sup>

*Section 67 of the Act* also allows parties to challenge an award on the basis of jurisdiction and provides two options of doing this: challenging any award of the

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<sup>225</sup> (2007) ECWA Civ 244.

<sup>226</sup> English Arbitration Act 1996, section 69(1).

<sup>227</sup> Andrew Tweeddale, Karen Tweeddale and Natasha Nguyen, 'Section 69 of the English Arbitration Act 1996 – When Fact and Law Collide' (2014) 80(2) *Arbitration* 136, 137.

<sup>228</sup> See *Geogas SA V Trammo Gas Ltd (The Beleares)* (1993) 1 *Lloyds Rep* 215; *Vinava Shipping Co Ltd v Finelvet AG (The Chrysalis)* (1983) 2 *All E.R.* 658.

<sup>229</sup> For a more detailed discussion on Section 69 of the English Arbitration Act, see Andrew Tweeddale, Karen Tweeddale and Natasha Nguyen (n 225); Paolo Esposito, 'The Development of Commercial Law through Case Law: Is Section 69 of the English Arbitration Act 1996 Stifling Progress' (2008) 74(4) *Arbitration* 429, 432; Taner Dedezade, 'Are you in? Or are you out? An Analysis of Section 69 of the English Arbitration Act 1996- Appeals on a Question of Law' (2006) 9(2) *International Arbitration Law Review* 56.

<sup>230</sup> See Section 69(2) of the English Arbitration Act 1996.

<sup>231</sup> See for example Article 34(6) of the ICC Arbitration Rules.

tribunal as to its substantive jurisdiction<sup>232</sup> or seeking an order of the court declaring an award made by the tribunal on the merits to be of no effect in whole or in part, because the tribunal did not have substantive jurisdiction.<sup>233</sup> In interpreting these two options, it was the view of the English court in *LG Caltex Gas v China Petroleum*<sup>234</sup> that while *Section 67(1) (a) of the English Act* relates to a situation where an arbitrator made an award holding that he did not have jurisdiction, *Section 67(1) (b) of the English Act* covers situations where the arbitrator had held that he had substantive jurisdiction and proceeded to decide the dispute on the merits between the parties.

Georgios Zekos has advocated for a special appeal mechanism within the arbitral process that will replace the process of appealing to the courts.<sup>235</sup> There are a number of reasons why this suggestion is not practical. For one, the extra step will increase the costs of an already expensive arbitration process. On the other hand, an appeal to the courts provides a much cheaper option for parties, since the State would be bearing a part of the cost. Furthermore, the extent to which an award creditor will be willing to cooperate in a subsequent process is highly in doubt.<sup>236</sup> Thus, in the absence of any agreement to that effect, the coercive powers of the court may in fact be useful in such post arbitration proceedings.

## **5.0 THE OHADA TREATY: THE UNIFORM ACT ON ARBITRATION**

### **5.1 Background**

The Organization for the Harmonization of Business Law in Africa Treaty (OHADA Treaty) was conceived in 1993 to encourage the development of commercial relations as well as encourage legal certainty through the unification of business laws in Africa.<sup>237</sup> According to *Article 1 of the OHADA Treaty*, this is to be achieved through the “elaboration and adoption of simple and modern common rules adopted to the situation of the economies...the implementation of appropriate legal proceedings...by encouraging the use of arbitration to settle contractual disputes”. Gaston Douajni

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<sup>232</sup> English Arbitration Act 1996, section 67(1)(a).

<sup>233</sup> English Arbitration Act 1996, section 67(1)(b).

<sup>234</sup> (2001) APP L.R 05/15.

<sup>235</sup> Georgios Zekos (n 149) 73.

<sup>236</sup> We touch on this issue in more detail in Section 2.1.6 of Chapter Seven.

<sup>237</sup> See generally the preamble of the OHADA Treaty.

describes the OHADA as a “technical tool, which produces legal instruments in business law”.<sup>238</sup> These common legal instruments in their various forms are known as Uniform Acts.<sup>239</sup> The treaty came into force in 1995 but was later revised in 2008, subsequent upon which it again came into force in 2010.<sup>240</sup>

A number of African writers have called for a harmonised international trade law in Africa.<sup>241</sup> Ironically, despite the fact that the treaty opens up its membership to the whole of Africa,<sup>242</sup> only seventeen African countries, all of which are former French colonies, have signed on to the Treaty.<sup>243</sup> Dr Emilia Onyema rightly noted that “the Member States of OHADA have some relevant and deep commonalities such as French as the official language of most of the member states, membership of the franc zone as it relates to their currencies and French law as their received laws along with the civil law tradition”.<sup>244</sup> All these have restricted the growth and membership of OHADA to French countries. No wonder S.K. Date-Bah submitted that the work of the OHADA is not sufficiently known in Anglophone Africa.<sup>245</sup>

Sherif El Saadani opined that “the lack of awareness amongst African jurists, especially in non-francophone African States, is due to OHADA’s failures to convince them and their respective governments that it is the most promising harmonization project on the continent, and this lack of conviction affects not only jurists in non-members States, but more surprisingly, also judges and lawyers in OHADA member

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<sup>238</sup> Gaston Douajni, ‘Recent Developments in OHADA Arbitration’ (2006) 23(4), *Journal of International Arbitration* 363.

<sup>239</sup> OHADA Treaty, article 5.

<sup>240</sup> Emilia Onyema, ‘Regional Arbitration Institution For ECOWAS: Lessons From OHADA Common Court of Justice and Arbitration’ (2014) *International Arbitration Law Review* 99.

<sup>241</sup> Gbenga Bamodu, ‘Transnational Law, Unification and Harmonization of International Commercial Law in Africa’ (1994) 38(2) *Journal of African Law* 125, 160; See also M. Ndulo, ‘Harmonisation of Trade Laws in the African Economic Community’ (1993) 42 *International Comparative Law Quarterly* 101.

<sup>242</sup> OHADA Treaty, article 53.

<sup>243</sup> The African Union is presently made up of fifty three members.

<sup>244</sup> Emilia Onyema (n 240) 99.

<sup>245</sup> S.K. Date-Bah, ‘The UNIDROIT Principles of International Commercial Contracts and the Harmonization of the Principles of Commercial Contracts in West and Central Africa: Reflections on the OHADA Project from the perspective of a common lawyer from West Africa’ (2014) 2 *Uniform Law Review* 269, 270.

States”.<sup>246</sup> Furthermore, the fact that the OHADA Treaty is itself substantially based on French and Civil Law does not help the acceptability of the Treaty by the rest of Africa. Provisions like *Article 42 of the OHADA Treaty*, which stipulate French as the only official language of the OHADA, have made it difficult for Anglophone countries like Nigeria, South Africa and Ghana, despite any good intentions, to actually consider the OHADA Treaty on its merits.<sup>247</sup>

Interestingly, this language issue also poses a problem even among members of the OHADA Treaty like Cameroon. Professor Enonchong<sup>248</sup> submitted that “the problem with *Article 42* is that it is manifestly incompatible with *Article 1(3) of the Cameroonian Constitution*, in which the bilingual nature of the State is enshrined”.<sup>249</sup> The Constitution specifically requires every Cameroonian law to be published both in English and French.<sup>250</sup> This arguably questions the constitutionality of the Treaty in Cameroon to the extent of its inconsistency with *Article 1 of the Cameroonian Constitution*. Taking this argument a step further, Professor Enonchong also argues that “the application of the Treaty in Cameroon discriminates against the English speaking Cameroonians and may amount to domination of the minority English speaking Cameroonians by the majority French speaking Cameroonians contrary to Articles 2, 13 and 19 of the African Charter on Human and Peoples’ Rights.”<sup>251</sup> In other words, the Treaty arguably touches on issues of fundamental human rights.

Ironically, the very idea behind the OHADA Treaty, which is to attract and aid investment activities within the OHADA region, is defeated by excluding English speaking investors from the scheme of things. Of course, there are English translations of the Treaty but as Professor Enonchong noted, “it is widely accepted that the English

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<sup>246</sup> Sherif El Saadani, ‘Communication: OHADA, a Continent-wide Perspective’ <[www.unidroit.org/english/publications/review/articles/2008-1&2/485-488.pdf](http://www.unidroit.org/english/publications/review/articles/2008-1&2/485-488.pdf)> accessed 5 July 2015.

<sup>247</sup> In 2002, the Ghanaian Attorney General and Minister for Justice established a committee to look into the possibility of Ghana joining the OHADA. The committee seems to have died a natural death as till date, there is no report on the works and findings of the committee.

<sup>248</sup> Nelson Enonchong, ‘The Harmonization of Business Law in Africa: Is Article 42 of the OHADA Treaty a Problem?’ (2007) 51(1) *Journal of African Law* 95, 100.

<sup>249</sup> Cameroon has two official languages, English and French. This is mainly as a result of the colonial history of the Cameroonian State.

<sup>250</sup> Article 31(3) of the Cameroonian Constitution 1996.

<sup>251</sup> Nelson Enonchong (n 248) 109.

translations are not always accurate or comprehensible. This makes it unsafe for English-speaking investors to rely on the English version of the Uniform Acts. Whereas French speaking investors around the world and their French speaking advisers have easy access to OHADA laws and may thereby be encouraged to invest in the OHADA zone, English speaking investors in Asia, Europe and North America are not being encouraged in the same way”.<sup>252</sup> On this issue of language, Sherif El Saadani rightly opined that “the harmonization will never work from a continent-wide perspective if OHADA retains French as its sole working language. The matter of language is unfortunately linked to the harmonization objective, since failure to acknowledge the diversity of languages in the African Continent may place the entire project at risk if this matter is not carefully handled”.<sup>253</sup>

Ntongho also criticises OHADA for not taking into consideration the African culture and practices and instead basing its framework solely on the foreign French law.<sup>254</sup> She argues further that this omission has discouraged other African countries from joining OHADA. Dr Onyeama however disagrees with Ntongho’s latter assertion and argues that flowing from the colonial history of the African continent, most if not all of Africa has adopted either the foreign Common or Civil Law as their law and so the French system of law is not necessarily strange to the whole of Africa.<sup>255</sup> In other words, unlike what Ntongho seems to suggest, the strangeness of French law can only be limited to common law Africa. Onyeama further opines that harmonisation of business laws in Africa may in fact be a tall or even impossible order primarily because of the diverse and competing legal systems in Africa.

It is not right to argue that the “failure” of the OHADA is because it is based on a foreign law. Onyeama may have a good point when she points out the difficulty in arriving at a commonly acceptable law for Africa. If indeed the OHADA project must succeed, it must not only take into consideration the multi legal system in Africa, but

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<sup>252</sup> *ibid* 98.

<sup>253</sup> Sherif El Saadani (n 246).

<sup>254</sup> R.A. Ntongho, ‘Political Economy of the Harmonization of Business Law in Africa’ (2012) 5(2) *Journal of Politics and Law* 58, 59.

<sup>255</sup> Emilia Onyema (n 240) 100.

also the multi-cultural as well as language diversity in Africa.<sup>256</sup> This is difficult but unlike what Onyema seems to suggest, definitely not impossible. Despite the competing interests and languages in Europe for example, they have been able to come up with common frameworks under the umbrella of the European Union.<sup>257</sup> In structuring a framework for Africa, stakeholders may do well to take a cue from Ntongho's criticism/suggestion and incorporate common features of law that cuts across Africa.

As of today, there are nine Uniform Acts in OHADA. Gaston Douajni pointed out that these were created " ...with the purpose of promoting investments in its member states..."<sup>258</sup> We will however be focusing on the Uniform Act on Arbitration.

## 5.2 The Uniform Act on Arbitration 1999

The Uniform Act on Arbitration (UAA) came into force on the 11<sup>th</sup> of June 1999. The Act provides a common legislation on arbitration, thus providing a framework for States with no specific legal text on arbitration and at the same time providing an updated framework for States with outdated frameworks.<sup>259</sup>

Unlike the UNCITRAL Law, which is merely a model, the UAA has compulsory jurisdiction over any arbitration seated in any of the OHADA member States.<sup>260</sup> In other words, it mandatorily applies to both commercial and civil disputes. This is unlike the Nigerian Arbitration Act and the UNCITRAL Model Law, which limits its scope to commercial disputes. As we have severally submitted, extending the scope of the arbitration framework beyond commercial disputes allows it to provide a real alternative to litigation, a system that resolves all types of disputes.

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<sup>256</sup> J.A. Yakubu, 'Community Laws in International Business Transactions' in C.M. Dickerson (ed), *United Business Laws for Africa* (2009) 6.

<sup>257</sup> The organisation, which is now the European Union began with the establishment of the European Coal and Steel Community under the Treaty of Paris of 1951. The European Economic Community and the European Atomic Energy Community were established later in the same decade. These communities were brought together under the umbrella of the European Union by the Maastricht Treaty of 1992.

<sup>258</sup> Gaston Kenfack Douajni, 'Arbitration in the Next 50 Years in the OHADA Context' (2008) 2 *Dispute Resolution International* 191.

<sup>259</sup> Francis Ndinga-Yocka, 'The features of the Arbitration Proceedings under the OHADA Uniform Act on Arbitration Law' (2014) 1(1), *Global Scholars Journal of Law and Conflict Resolution* 1.

<sup>260</sup> Uniform Act on Arbitration 1999, article 1.



The UAA seems to leave the issue of arbitrability open ended to any right which parties have the capacity to dispose of.<sup>261</sup> These basically includes rights which can be sold, waived, gifted or bequeathed away. Exceptions to this provision will vary depending on the jurisdiction in question. Common and obvious exceptions will include issues relating to criminal law and possibly public policy, which are generally agreed to be beyond the scope of arbitration.

Under our previous discussion on the English Arbitration framework, we submitted that going by a strict interpretation of the English Act, the principle of separability only becomes relevant when the head contract is declared invalid. This arguably is a potential source of unnecessary controversy and litigation. The UAA is proactive in this regard as it clearly separates the main contract from the arbitration agreement when it states that “the arbitration agreement is independent of the main contract”.<sup>262</sup> Our previous argument therefore does not apply here.<sup>263</sup>

Natural and artificial persons as well as State and State entities within the OHADA region can be parties to a valid arbitration agreement.<sup>264</sup> *Article 3 of the UAA* provides that an “an arbitration agreement shall be in writing or by any other means permitting it to be evidenced, notably by reference made to a document stipulating it”. As Samassekou and Song noted, it is not clear how this provision should be interpreted.<sup>265</sup> Some writers seem to have interpreted this provision to include oral agreements. Frances Ulrich Ndinga-Yocka has for example submitted that “...under the OHADA UAA law, the arbitration agreement does not need to be materialised for it to be valid. It may be in writing or oral...For its writing form is not a condition of its validity but just an element that permits to prove its existence...”<sup>266</sup> Samassekou and Song also

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<sup>261</sup> Article 2 of the OHADA Treaty.

<sup>262</sup> Article 4 of the Uniform Act on Arbitration 1999.

<sup>263</sup> See Section 4.2 of Chapter Six of this thesis.

<sup>264</sup> See Article 2 of the Uniform Act on Arbitration 1999.

<sup>265</sup> Mamoudou Samassekou and Lianbin Song, ‘A Comparative Study: Arbitration Agreement in OHADA and People’s Republic of China Arbitration Laws’ (2011) 4(1) *Journal of Politics and Law* 242,243.

<sup>266</sup> Francis Ndinga-Yocka (n 259) 1.

stated that “other means of entering into an arbitration agreement might be possible, for example by oral agreement before witnesses who could then attest...”<sup>267</sup>

While on the surface, the aforementioned submissions seem probable, this writer argues that it is an incorrect interpretation of *Article 3*. One must point out that unlike other arbitration frameworks, the UAA does not state what its definition of writing includes.<sup>268</sup> It is therefore this writers’ submission that when *Article 3 of the UAA* goes on to state that “...or by any other means permitting it to be evidenced, notably by reference made to a document stipulating it,” it is referring to agreements contained in means of communication like email, letters and fax, where there is a written evidence of the agreement. This position is further supported when one examines *Article 31 of the UAA*, which provides that “the existence of the award is established by the production of the original award accompanied by the arbitration agreement or copies of these documents satisfying the conditions required for their authenticity”. From the foregoing, it is apparent that documentary proof of an agreement is needed to enforce an arbitration award. It can also by extension be implied that *Article 3 of the UAA* requires documentary evidence of an agreement.<sup>269</sup>

Again, as we have said previously, this strict requirement of form by a so called African framework is inimical to the growth of a vibrant domestic arbitration practice in Africa, indeed any underdeveloped country at all, especially when one considers the level of education in some of these places.<sup>270</sup> Besides, as the Committee on the reform of the UNCITRAL Model law rightly noted, commercial law and relations has developed beyond a strict requirement of form. To the extent that the Treaty seeks to provide a business friendly framework, the writing requirement is counterproductive.

As with many other Arbitration frameworks, parties are given a free hand to determine the process of constituting their arbitration tribunal. In the absence of this,

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<sup>267</sup> Mamoudou Samassekou and Lianbin Song (n 265) 243.

<sup>268</sup> It can be argued that the reason why other arbitration frameworks will specifically define writing to include communications contained in fax, letter and emails, is because these methods of communication do not fall into the traditional or usual definition of writing.

<sup>269</sup> This writing requirement applies to both international and domestic arbitrations as the UAA does not distinguish between them.

<sup>270</sup> For example, we discuss the high level of illiteracy in Nigeria. See Section 5.1 of Chapter Four.

the UAA provides a default number of one or three arbitrators. In other words, the UAA is not clear about the default number of people that will make up the arbitration panel. Furthermore, rather than providing some form of general guideline that will assist parties in choosing between either of the two default numbers, the Act does not provide any guidance on how the actual number should be determined. So for example, in choosing between the two default numbers, do we look at the value of the dispute, the nationalities of parties or the nature of the dispute?<sup>271</sup>

The UAA is affiliated with the Common Court of Justice and Arbitration (“CCJA”), an arbitration institution with its own special set of procedural rules.<sup>272</sup> Unlike the Nigerian Arbitration Act, parties under the jurisdiction of the UAA have the ability to choose the rules that will apply to their dispute.<sup>273</sup> In other words, parties are not bound to apply the procedural rules of the CCJA.<sup>274</sup> Furthermore, unlike the Ghanaian Act for example, the UAA does not prescribe the CCJA or its rules as a default. Parties may therefore opt for institutional arbitration under CCJA’s arbitration rules, the rules of other arbitration institutions or via an ad hoc process.<sup>275</sup> Benoit Le Bars rightly notes that parties seeking to arbitrate under OHADA have the choice between the predictability and structure of institutional arbitration on the one hand, and the flexibility and freedom of ad hoc arbitration on the other.<sup>276</sup> It must be noted also that unlike the ADRC, the CCJA is not a creation of the UAA but of the OHADA Treaty.

Gaston Doujani opined that the arbitration culture within the OHADA cannot be considered to have become widespread since the introduction of the UAA.<sup>277</sup> In an assessment report prepared in 2014 by Dr Wernel Jahnel for the African Development

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<sup>271</sup> See Section 4.1.4 of this chapter.

<sup>272</sup> Article 3 of the OHADA Treaty provides for five principal organs of OHADA, out of which the CCJA is one.

<sup>273</sup> Article 10 of the Uniform Act on Arbitration 1999.

<sup>274</sup> The Rules of the CCJA were adopted in April 1996, published in November 1997 but did not come into force until 1998.

<sup>275</sup> Emilia Onyema, ‘Arbitration Under the OHADA Regime’ (2008) 11(6) *International Arbitration Law Review* 205, 218.

<sup>276</sup> Benoit Le Bars, ‘Arbitrating in West and Central Africa: An Introduction to OHADA’ *Kluwer Arbitration Blog* (21 February 2013) <<http://kluwerarbitrationblog.com/2013/02/21/arbitrating-in-west-and-central-africa-an-introduction-to-ohada/>> accessed 26 March 2016.

<sup>277</sup> Gaston Kenfack Douajni, ‘Recent Developments in OHADA Arbitration’ (2006) 23(4) *Journal of International Arbitration* 363, 372.

Bank on arbitration institutions in Cote d'Ivoire, Egypt and Mauritius, it was revealed that since the establishment of the CCJA in 1998, it has only administered sixty-four arbitrations out of which it has successfully completed only about half of the said number. The remaining proceedings were terminated or withdrawn by the parties.<sup>278</sup> This report reflects how unpopular the arbitration framework is within the region.

In addition, the CCJA is not only an arbitration institution but also a Supreme Court of some sort, with jurisdiction over all business disputes arising within the OHADA region.<sup>279</sup> In other words, unlike regular arbitration institutions,<sup>280</sup> which as Collin Namachanja rightly noted,<sup>281</sup> provide mainly administrative support to the arbitral process, the CCJA combines both administrative and judicial functions in one. Where parties fail to prescribe or agree on the applicable arbitration rules, the UAA mandates the tribunal to conduct the proceedings in any way it deems fit.<sup>282</sup>

It is unfortunate that the UAA involves national courts in the administration of arbitration especially when it has an institution like the CCJA with judicial powers. For example, *Article 5 of the UAA* provides that in situations where parties are unable to agree on a sole arbitrator or where the two arbitrators are unable to agree on a third arbitrator, the Act empowers the court to make the appointment.<sup>283</sup> This is unlike the situation in a jurisdiction like Ghana, which as we have seen makes use of its ADRC as an appointing authority to intervene in situations like this. Similarly, institutions like the ICC Court of Arbitration, which the CCJA is in many ways modelled after,<sup>284</sup>

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<sup>278</sup> ADBF, Assessment Report of arbitration centres in Côte d'Ivoire, Egypt and Mauritius (10 April 2014) <[www.afdb.org/fileadmin/uploads/afdb/Documents/Procurement/Project-related-Procurement/Assessment\\_Report\\_of\\_arbitration\\_centres\\_in\\_C%C3%B4te\\_d%E2%80%99Ivoire\\_Egypt\\_and\\_Mauritius.pdf](http://www.afdb.org/fileadmin/uploads/afdb/Documents/Procurement/Project-related-Procurement/Assessment_Report_of_arbitration_centres_in_C%C3%B4te_d%E2%80%99Ivoire_Egypt_and_Mauritius.pdf)> assessed 6 February 2016.

<sup>279</sup> Gaston Kenfack Douajni, 'The Recognition and Enforcement of Arbitral Awards in OHADA Member States' (2003) 20(2) *Journal of International Arbitration* 205.

<sup>280</sup> By traditional institutions, we are referring to institutions like the International Chamber of Commerce, London Court of International Arbitration, Singapore International Arbitration Centre as well as national arbitral institutions like the Alternative Dispute Resolution Centre in Ghana.

<sup>281</sup> Collins Namachanja, 'The Challenges facing arbitral institutions in Africa' (2016) 82(1) *Arbitration* 44, 45.

<sup>282</sup> Article 14 of the Uniform Act on Arbitration 1999.

<sup>283</sup> The Act does not specify any particular court and so it is up to member states to determine the particular court to perform this task and every other one. See Article 5(b) of the Uniform Act on Arbitration 1999.

<sup>284</sup> Gaston Kenfack Douajni (n 277) 370; See also Gaston Kenfack Douajni (n 258).

have incorporated procedures which enable the former to make appointments in specific situations.<sup>285</sup> The point being made here is that many of the functions bestowed upon the courts could easily have been performed by the CCJA.

Moreover, to the extent that the UAA allows the courts to act, it leaves the powers of the court open ended. Take for example the process of challenging the appointment of an arbitrator.<sup>286</sup> Unlike the Nigerian,<sup>287</sup> Ghanaian<sup>288</sup> and English Acts<sup>289</sup> which stipulate the grounds upon which the courts may exercise jurisdiction over a challenge application, the UAA in this regard leaves the scope of the courts authority open ended, thus giving room for abuse. Judicial intervention is not necessarily a bad thing. In fact, as we have argued, the courts provide a useful support to the arbitral process.<sup>290</sup> This writer however submits that the exercise of judicial powers in the course of the arbitral process should be clearly defined.

Under the UAA, the duty of the arbitrator to “disclose” is at his discretion.<sup>291</sup> In other words, unlike the ICC’s Arbitration Rules or the Ghanaian Act, which mandates the arbitrator to complete a form providing information relating to his impartiality, independence and availability amongst others,<sup>292</sup> the UAA only expects the arbitrator to disclose at his discretion. Notwithstanding the good intentions of an arbitrator, this writer submits that the decision as to the impartiality and independence of the arbitrator is not a decision that should be made by the arbitrator himself. It is a fundamental principle of fair hearing that you cannot be a judge in your own cause. Besides, as at the time of appointment, the information at the disposal of the arbitrator is not enough for him to make a true call as to any potential or actual conflict. At the stage of appointment, only parties have all the information relating to the dispute and so to the extent of this ignorance, prospective arbitrators cannot with all certainty, conduct a comprehensive conflict check on themselves.

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<sup>285</sup> See Article 10.3 of the CCJA Arbitration Rules.

<sup>286</sup> Uniform Act on Arbitration 1999, article 7.

<sup>287</sup> Nigerian Arbitration and Conciliation Act, section 8.

<sup>288</sup> Ghanaian ADR Act 2010, section 18.

<sup>289</sup> English Arbitration Act 1996, section 24.

<sup>290</sup> See Section 3.2 of Chapter Six.

<sup>291</sup> Uniform Act on Arbitration 1999, article 7.

<sup>292</sup> ICC Arbitration Rules, article 11(2).

One laudable provision in the UAA is *Article 12*, which prescribes a six months' time limit within which every arbitration must be concluded.<sup>293</sup> Upon expiry, this time can be extended by an agreement of all the parties or through an application made by any of the parties to the tribunal or court,<sup>294</sup> failing which the arbitration abates.<sup>295</sup> This provision helps to avoid the problem of delay which as we have seen,<sup>296</sup> has come to be associated with the court system in many jurisdictions in Africa.

Proper planning is needed to ensure that proceedings are concluded within the six-month period. Unfortunately, the UAA fails to provide a process that will ensure proper time management. As we have seen, the Ghanaian ADR Act<sup>297</sup> as well as ICC's Arbitration Rules provide a good model in this regard. The ICC Arbitration Rules for example, provides for a case management conference during which important procedural issues will be agreed upon.<sup>298</sup> This prevents the proceedings from suffering from unnecessary delays. In addition, the arbitration panel with the input and agreement of parties, is expected to come up with a procedural timetable, which clearly states the timeline within which all parties are to perform specific tasks.<sup>299</sup>

Under the UAA, the decision of the tribunal is final<sup>300</sup> and it serves as *res judicata* between the parties and the issues decided.<sup>301</sup> Under the UAA, there are three major recourses against the award under the Act; first of all, third parties whose rights have been affected by the award but who were not called or involved in the arbitrations proceeding have the right to approach the arbitration tribunal to challenge the award.<sup>302</sup> Since the validity of an arbitration agreement is hinged on parties' agreement, one is tempted to ask if a third party can force himself to be a part of an arbitration agreement or proceeding, if the original parties are not in agreement with

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<sup>293</sup> The recently introduced Indian Arbitration Ordinance 2015 also provides that the award must be delivered within a period of twelve (12) months from the date in which the arbitrator received notice of their appointment. See Section 15 of the Indian Arbitration Ordinance 2015.

<sup>294</sup> Uniform Act on Arbitration 1999, article 12, paragraph 2.

<sup>295</sup> *ibid* article 16.

<sup>296</sup> See Section 3.1 of Chapter Two and Section 1.0.1 of this chapter.

<sup>297</sup> Ghanaian ADR Act 2010, section 29.

<sup>298</sup> ICC Arbitration Rules, article 24 (1).

<sup>299</sup> *ibid* article 24(2).

<sup>300</sup> Uniform Act on Arbitration 1999, article 25.

<sup>301</sup> *ibid* article 23.

<sup>302</sup> *ibid* article 25 Paragraph 4.

this position.<sup>303</sup> As we have seen, the Ghanaian ADR Act makes similar provisions but differs from the UAA by making the court (and not the tribunal) the decision maker in this regard.<sup>304</sup> This is the correct approach since everyone has a right to approach the court to seek protection.

Secondly, after an award has been delivered, the UAA also allows any party who comes across any information which would have had serious impact on the award to bring same to the attention of the arbitration tribunal for an award revision.<sup>305</sup> Curiously, the Act does not provide a time frame within which this action must be done. This in other words implies that any party is allowed to challenge the award long after the dispute has been decided, with no real time limit. Not only is this open ended appeal process very dangerous, this writer wonders why the tribunal is still being allowed to delve into substantive issues after becoming *functus officio*. Appealing to the CCJA may be a more acceptable option in this regard.

A petition for nullity can be made against the decision of the arbitration tribunal at the national courts of a member State. *Article 26 of the UAA* defines the scope of the petition by stating six grounds under which a petition for nullity can be brought. For example, a petition for nullity would only be allowed where the existence or validity of the arbitration agreement is in question or where the arbitral tribunal was irregularly composed, amongst others. Of all of them, the fifth ground, which refers to a violation of an international public policy issue, is probably the vaguest. As Justice Kekewich said in *Davies v Davies*,<sup>306</sup> public policy is generally not easily explained. Justice Burrough also opined that public policy is a very unruly horse and once you get astride it, you never know where it will carry you.<sup>307</sup> In view of the multifarious nature of the OHADA jurisdiction, it is difficult to understand what will qualify as an

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<sup>303</sup> Recent developments in the U.S seem to suggest that by arguing equitable estoppel, third parties to an arbitration could be made to participate in arbitration proceeding. For example, in *the City of Riverside v Mitsubishi Heavy Industries Ltd* WL 1028835 (Dist Ct. SD, 2014), the court held that where a non-signatory knowingly exploits the agreement containing the arbitration clause despite the fact that he did not sign the agreement, he could be made subject to the arbitration agreement.

<sup>304</sup> Ghanaian ADR Act 2010, section 28.

<sup>305</sup> Uniform Act on Arbitration 1999, article 25 Paragraph 5.

<sup>306</sup> (1887) L.R 36 C.D 364.

<sup>307</sup> *Richardson v Mellish* (1824) 2 Bing 252.

international public policy issue and so some form of guidance either in a revised version of the UAA or via a pronouncement of the CCJA will be useful.<sup>308</sup>

In concluding, we should point out that the UAA creates a two-staged appellate system: the decision of the local courts in a petition for nullity, is further subject to an appeal to the CCJA.<sup>309</sup> This in a way defeats one of the advantages of arbitration over litigation, a quicker process. Rather than create a two-staged appellate system, the UAA ought to establish a one stepped appeal process that ends at the CCJA.

## CONCLUDING REMARKS

In this chapter, we highlighted and critically discussed developments that have occurred within similar and/or relevant arbitration frameworks, between the time when the Nigerian Arbitration and Conciliation Act was introduced in 1988 and now. We touch on the Ghanaian ADR Act 2010, the revised Model Law 2006, the English Arbitration Act 1996 and the Uniform Act on Arbitration 1999.

Significantly, we lauded the Ghanaian ADR Act for incorporating the rooted and very familiar customary arbitration practice into its framework. We also commended the UNCITRAL Model Law for introducing a more flexible definition of an arbitration agreement. In our discussion on the English Arbitration Act 1996, we among many other points justified the consolidation provision, which allows parties merge arbitrations with similar issues, relief and parties. Under our discussion on the Uniform Act on Arbitration, we also supported the introduction of a timeline within which arbitration proceedings should ordinarily be completed.

On the other hand, we criticised a number of provisions in the said frameworks. For instance, we criticised the Ghanaian ADR Act for making separate provisions for arbitration (in the traditional sense) and customary arbitration. We also briefly discussed the ability of courts to grant interim measures as against the emerging emergency arbitrator provision. On the Uniform Act on Arbitration, we for example criticised the underutilisation of the existing CCJA institution and the over

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<sup>308</sup> Admittedly, this problem is not peculiar to the UAA as other frameworks also suffer from this ambiguity. See Section 2.1.3 of Chapter Seven.

<sup>309</sup> Uniform Act on Arbitration 1999, article 25.



involvement of the local courts in issues which can be easily be determined by the CCJA. This discussion will prove to be very useful in our next and final chapter.

## CHAPTER SEVEN

### RECOMMENDATIONS AND CONCLUSION

#### INTRODUCTION

This chapter sums up all the work done in previous chapters.

In Chapter Two of this thesis, we discussed the problems of the Nigerian judicial system and concluded by recommending arbitration as an effective solution to some of these problems. In Chapter Three, we introduced the reader to basic arbitration concepts and more importantly justified our selection of arbitration as against other existing methods of resolving disputes like mediation and negotiation. In Chapter Four and Five, we introduced and critically analysed the existing arbitration frameworks and practices in Nigeria: the Nigerian Arbitration and Conciliation Act 2004 and the customary arbitration framework.<sup>1</sup> We concluded each of the aforementioned chapters by highlighting the gaps and shortcomings in the said frameworks. In Chapter Six, we highlighted and critically analysed specific but relevant arbitration frameworks, in a bid to identify applicable developments that have occurred within the sphere of arbitration (since the Nigerian Act was introduced in 1988) and from which our recommended framework can draw a few lessons.

In this concluding chapter, we recommend a framework which takes into consideration the peculiarities of the Nigerian nation and any relevant aspects of the pre-existing arbitration practices in Nigeria, as well as the recent trends and innovations that have occurred in relevant jurisdictions. In coming up with this model, we will avoid tailoring our proposed model after any of the acclaimed arbitration frameworks. Instead we suggest a bespoke model that among others, incorporates the best practices and relevant aspects of the examined frameworks.

The proposed framework is limited to domestic arbitration. This is as against the existing Nigerian Arbitration and Conciliation Act, which combines both domestic and international arbitration into one framework. We argue that combining domestic and international arbitration in one framework inhibits an even development of

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<sup>1</sup> Chapter A18 of the Laws of the Federation of Nigeria 2004.

domestic arbitration in Nigeria. We also redefine the Nigerian domestic arbitration practice to include customary arbitration. In other words, like Ghana we recommend a statutory arbitration framework that recognises and incorporates customary arbitration within its purview. However unlike Ghana, which provides different parts for customary arbitration and arbitration,<sup>2</sup> we argue that there is no justification for this distinction and so we combine both practices in one framework.

In order to aid the development of the domestic arbitration practice in Nigeria, we advocate for constitutional reforms, which will place issues relating to domestic arbitration solely within the exclusive legislative list.<sup>3</sup> We also advocate for the establishment of a National Arbitration Centre (“NAC”) to facilitate the development and practice of domestic arbitration in Nigeria. This initiative, which will be run by a Board of Directors made up of representatives from stakeholder private organizations like the Nigerian Bar Association, National Association of Chambers of Commerce, Industries, Mines and Agriculture as well as a representative from the Nigerian Association of Small and Medium Enterprises, amongst others, will also involve the financial involvement of the government through the Ministry of Justice. We also advocate for the establishment of a special Superior Court of Record, which will be known as the Domestic Arbitration Court (“DAC”), which like the Common Court of Justice and Arbitration (CCJA)<sup>4</sup> will deal with disputes or issues arising from domestic arbitration as well as international arbitrations with seats in Nigeria.

In addition, in the course of developing a bespoke practice for Nigeria, we also touch on what have been regarded as the fundamental elements of arbitration:<sup>5</sup> the agreement, the dispute, starting an arbitration, the arbitral proceeding as well as the tribunals’ final decision and its enforcement. In the course of discussing these elements, we advocate for a number of changes as against the conventional practice in Nigeria (and even generally). For example, we advocate for a flexible arbitration

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<sup>2</sup> Here and unless we say otherwise, arbitration refers to the practice in the traditional sense.

<sup>3</sup> The exclusive legislative list contains issues solely within the jurisdiction of the Federal legislative arm. See Section 4 of the 1999 Nigerian Constitution.

<sup>4</sup> We mentioned in Chapter Six that the Uniform Act on Arbitration of the OHADA Treaty sets up the CCJA to adjudicate business disputes arising within the OHADA region.

<sup>5</sup> Nigel Blackaby et al, *Redfern and Hunter on International Arbitration* (5<sup>th</sup> edn, Oxford Press, 2009) 14.

agreement that is able to accommodate both oral and written agreements, as against the present practice which requires a written and signed arbitration agreement. However, because of particular issues, which we highlight, we limit the application of oral arbitration agreements to disputes below a particular sum. We also redefine the concept of submission agreement by borrowing a leaf from the customary arbitration practice in Nigeria. We emphasise specific provisions in the Nigerian Act which violate parties' autonomy and call for a change. We extend the scope of the Nigerian arbitration framework by allowing non-commercial disputes to be arbitrable. We however clearly identify the limits to our proposed framework. We also identify and deal with various issues arising during the appointment and arbitration process.

At various times, we address the issue of cost, which is arguably one of the biggest disadvantages of arbitration. While we make recommendations in a bid to reduce cost, we admit that it may in fact be difficult to design an arbitration process that will be as cheap as the litigation process, (mostly because parties have more financial involvement in arbitration than litigation). We believe that a cheap and cost effective process is possible, but this will to a large extent depend on parties' cooperation. For example, a short proceeding will be much cheaper than a long one, a one-person tribunal will be cheaper than a three-person tribunal, amongst many other examples. Besides, we submit that the purpose of this thesis will have been achieved if it provides a framework that is as cheap as possible as well as able to provide a viable alternative to a substantial number of people who are willing and able to make use of arbitration: this ultimately reduces the pressure on the courts and increases efficiency.

Furthermore, we submit that a timely and efficient arbitration system in a country like Nigeria may in fact be cheaper than the existing and very problematic litigation process. Notwithstanding this position, we recommend provisions which will in the long run reduce the cost of arbitration for parties. For example, the aforementioned financial involvement of the government in the activities of the NAC will not only be part of the government's much needed reforms within the judiciary, it will also to a large extent subsidize the overall cost of arbitration.

We conclude this thesis by recapping the major points made therein.

## 1.0 THE PROPOSED DOMESTIC ARBITRATION FRAMEWORK

### 1.1 The Need for a Bespoke Law.

Law is fluid and should ordinarily vary from jurisdiction to jurisdiction. It should be tailored towards the needs of the people for which it has been enacted. According to Baron de Montesquieu, law “should be adapted in such a manner to the people for whom they are framed that it should be a great chance if those of one nation suit another...It should be in relation to the nature and principles of each government...They should have relation to the degree of liberty which the Constitution will bear; to the religion of the inhabitants, to their inclination, riches, number, commerce, manners and custom...It should be in relation to the climate of each country, to the quality of its soil, to its situation and extent.”<sup>6</sup>

Besides, as the Supreme Court of Nigeria rightly noted in *Salisu Yahaya v. The State*,<sup>7</sup> apart from the issue of sovereignty, one of the underlying reasons English law, despite its similarity with Nigerian law, will normally not be binding on Nigerian courts, is based on the assumption that there is ordinarily an existing Nigerian equivalent, which is more relevant and applicable. Therefore, while model or established laws provide a useful guide on what law in its successful and finished form should look like, adopting same in the exact form is counterproductive; local lawmakers still have to ensure that it is adapted to suit the country’s specific needs.

The reason for our aforementioned position is simple: these so called model frameworks were enacted with specific jurisdictions and/or needs in mind. For example, while it was the intention of the promoters of the UNCITRAL Law to provide a model law of acceptable standard for member nations to adopt, we have seen and will still see that the Model Law is more suitable for international arbitrations (and not domestic arbitration)<sup>8</sup> and arguably, for countries with developed legal systems.

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<sup>6</sup> Charles De Secondant, Baron de Montesquieu, *The Spirit of the Laws* (Thomas Nugent Trans. J.V. Prichard rev) 7 1914.

<sup>7</sup> (2002) 3 SCM 146.

<sup>8</sup> UNCITRAL Model Law 1985, article 1(1).

Ironically, even some of these developed countries have found the Model Law to be unsuitable. For instance, the United Kingdom in coming up with the English Arbitration Act 1996,<sup>9</sup> critically considered the Model Law and found aspects of the Law to be unsuitable to her needs.<sup>10</sup> It is therefore unfortunate that Nigeria like other African countries, chose to wholly adopt the said Law without considering its suitability to her situation.<sup>11</sup> It is this omission that made a country like Nigeria, which today still has a high concentration of uneducated people, to as far back as 1988, adopt without any variation, a Model Law which insists on a signed agreement.<sup>12</sup>

While we may argue that the *English Arbitration Act 1996* provides a competing and very attractive alternative to the Model Law, one must not forget that the English law was proposed by the Departmental Advisory Committee, with the specific needs of the United Kingdom in mind.<sup>13</sup> This was after a thorough consultation with relevant stakeholders within the English arbitration community. Paul Newman rightly opined that the promoters of the new English legislation decided that although the Model Law had many useful lessons, English law and practice were too well developed by judicial precedent to justify the wholesale adoption of the Model Law.<sup>14</sup> The exercise therefore became one of consolidating the Arbitration Acts 1950-1979, modernising the language and inserting apposite features from the Model Law. In addition, the legal, political, social and even economic system in England is in many ways different and probably more developed than her Nigerian counterpart.<sup>15</sup> It will be foolhardy for Nigeria to wholly propose or adopt the law of a country which was made under special circumstances and with a different level of economic and political development from Nigeria.

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<sup>9</sup> See Section 3.1 of Chapter Six.

<sup>10</sup> See the Department Advisory Committee's report on the Arbitration Bill 1996.

<sup>11</sup> African countries which have domesticated the Model Law include Nigeria, Egypt, Kenya and Zambia, amongst many others.

<sup>12</sup> See Section 1 of the Nigerian Arbitration and Conciliation Act.

<sup>13</sup> See Section 3.1 of Chapter Six for a detailed discussion on this issue.

<sup>14</sup> Paul Newman, *Alternative Dispute Resolution* (CLT Professional Publishing Ltd 1999) 3.

<sup>15</sup> A substantial part of the Nigerian law is modelled after the received English law, which by themselves are very unsuitable for Nigeria. Assuming without conceding that these laws are suitable for Nigeria, while the United Kingdom has since adapted these laws to suit current realities, Nigeria remains stuck in the past. This has to a large extent affected the development of arbitration in Nigeria.

It is therefore very unfortunate that the Nigerian Arbitration and Conciliation Act 1988, like majority of the laws in Nigeria, was wholly adopted without taking into consideration the idiosyncrasies and peculiarities of the nation. In fact, a substantial part of Nigerian law is outdated and/or based on older versions of the English law.<sup>16</sup> For example, the existing Marriage Act 2004<sup>17</sup> was originally introduced in 1914 and is substantially based on the old English Marriage law in the United Kingdom.<sup>18</sup> One of the many contentious parts of the said Marriage Act is the provision which criminalises bigamy.<sup>19</sup> While this writer is totally against bigamy, it is on record that many top ranking Nigerians in authority are involved in bigamy. Bigamy is a culturally accepted and deeply rooted Nigerian (indeed African) practice and so victims are reluctant to make formal complaints. The point being made here is that law loses its value when irrelevant or generally unacceptable principles are enacted as law. This is one major factor that has contributed to the failure of the Arbitration Act, especially in the resolution of domestic arbitration disputes in Nigeria.<sup>20</sup>

Therefore, while we examine relevant and successful arbitration frameworks in other jurisdictions, we only use this as a form of guide. In other words, we recommend a domestic arbitration framework,<sup>21</sup> which not only takes into consideration the peculiarities of the Nigerian people but also the pre-existing arbitration practices in Nigeria as well as the recent trends and innovations that have occurred in relevant jurisdictions. Our proposed framework is bespoke and tailored towards the needs and requirements of the Nigerian nation while also incorporating the best and relevant aspects of the frameworks, which we have examined in the course of this thesis.

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<sup>16</sup> Another good example (apart from the Marriage Act) is the existing Criminal Code Act in Nigeria (Cap 77 of the Laws of the Federation of Nigeria 2004), which was originally introduced on the 1<sup>st</sup> of June 1916.

<sup>17</sup> Cap 218, Laws of the Federation of Nigeria 2004.

<sup>18</sup> See the Preamble to the said Nigerian Act.

<sup>19</sup> See Section 47 of the Marriage Act; See also Section 370 of the Criminal Code Act.

<sup>20</sup> See Section 5.0 of Chapter Four for a discussion on the problems of the arbitration system in Nigeria.

<sup>21</sup> As we will come to see under our discussions on arbitrability further on in this chapter, we define the scope of domestic arbitration in Nigeria.

## 1.2 Exclusive Legislative List

In Chapter Four, we acknowledged an ongoing controversy on the legislative arm which presently has proper jurisdiction over issues relating to arbitration.<sup>22</sup> The National Committee on the Reform and Harmonization of Arbitration and ADR Laws in Nigeria, in 2005 came to the conclusion that the power of the National Assembly could be implied from a combined interpretation of *Item 62 and 68* of the exclusive legislative list and therefore international arbitration as a whole was within the jurisdiction of the National Assembly, while domestic arbitration was within the jurisdiction of the State House of Assembly.<sup>23</sup>

Further to this conclusion, the committee came up with two draft law: the Federal Arbitration and Conciliation Act ("FACA") and the Uniform State Arbitration and Conciliation Law ("USAC"). While the purview of the FACA was limited to international or inter-state arbitration, the USAC was put in place as a model domestic arbitration framework and which States were expected to adopt for application within their jurisdiction. In terms of substance, both draft are more or less the same.<sup>24</sup>

Like a number of Nigerian academics,<sup>25</sup> we disagreed in part with the Committee's conclusion and opined that while it is possible to argue that arbitration complements trade and commerce, it is wrong to suggest that it is in fact incidental or supplementary to trade and commerce because it is not a compulsory component of both. Clearly, it is unacceptable to assert that international arbitration is limited to trade and commerce since it can also be used in resolving non-commercial disputes.<sup>26</sup>

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<sup>22</sup> See Section 5.3 of Chapter Four.

<sup>23</sup> Item 62 empowers the National Assembly to legislate on "trade and commerce, and in particular a) trade and commerce between Nigerian and other countries...and trade and commerce between the States". Item 68 of the said second schedule empowers the National Assembly to make any law on "any matter incidental or supplementary to any matter mentioned elsewhere in this list".

<sup>24</sup> Till date, the government has not implemented these recommendations.

<sup>25</sup> Adewale Olawoyin, 'Charting New Waters with Familiar Landmarks' (2009) 26(3) *Journal of International Arbitration* 373, 380; Adebayo Adaralegbe, 'Challenges in Enforcement of Arbitral Award in Capital-Importing States; The Nigerian Experience' (2006) 23 *Journal of International Arbitration* 401, 408.

<sup>26</sup> For example, there has been a rise in the practice of family arbitration in the United Kingdom. See Nigel Shepherd, 'Top Judge Gives Green Light to Family Arbitration' (2014) 1 *Private Client Business Journal* 65. We have the Court of Arbitration for Sports, which is used to resolve even the non-commercial aspects of sports. We have also mentioned that it has proven to be useful in the resolution of construction disputes.



We concluded this argument by submitting that while domestic arbitration may very well be within the jurisdiction of the State's House of Assembly,<sup>27</sup> the existing Arbitration and Conciliation Act remains valid by virtue of *Section 315 of the Nigerian Constitution*<sup>28</sup> and therefore the Nigerian Act still has jurisdiction over domestic arbitration proceedings, at least until such a time as the said Act is either repealed or replaced with a completely new Act.<sup>29</sup> In other words, any amendment to the existing Act can only be undertaken by the National Assembly.

This does not however prevent the State House of Assembly from exercising its right to make its domestic arbitration law for application within its jurisdiction.<sup>30</sup> To the extent that our proposed framework is a strictly domestic arbitration law, the framework is clearly within the jurisdiction of the State House of Assembly.

Notwithstanding the foregoing argument, we submit that allowing only the State House of Assembly to exercise jurisdiction over domestic arbitration proceedings will either inhibit the growth of domestic arbitration in Nigeria, or at the very best encourage an uneven development of domestic arbitration in Nigeria, since unlike the National Assembly, a State House of Assembly can only enact laws that will operate within its jurisdiction.<sup>31</sup> Till date, only Lagos State, the commercial hub of the nation, has recently and successfully enacted an arbitration law in Nigeria. The emergence of this law must be linked to the rise in the number of international and commercially related transactions within the State. This explains why States that are less

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<sup>27</sup> This is the State's legislative arm.

<sup>28</sup> Section 315(1) (a) of the Constitution of the Federal Republic of Nigeria provides that "...an existing law shall have effect...and shall be deemed to be an Act of the National Assembly". Section 315(4)(b) of the Constitution goes ahead to define existing laws to mean "any rule of law or enactment or instrument whatsoever which is in force immediately before the date when this section comes into force or which having been passed or made before that date, comes into force after that date..."

<sup>29</sup>In *Attorney General of the Federation v. Attorney General of the 36 States* (2002) 6 SCM 1, it was held that until an enactment by the National Assembly or indeed by a State Assembly, is repealed in clear terms or duly avoided by a court of law, it has the full force of law as an enactment duly and validly made by the appropriate legislature.

<sup>30</sup> If for any reason there is any consistency between an Act of the National Assembly and the Law of the House Assembly, the law is clear that the Act of the National Assembly takes precedence over the Law. See *Attorney General of Ogun State v. Attorney General of the Federation* (Consolidated) (1982)1-2 SC 7.

<sup>31</sup> Section 4(2) and (3) of the 1999 Nigerian Constitution.

industrialised and commercially inclined like Oyo, Osun, Ogun, Kebbi, amongst others, have failed to enact a standard arbitration law.

For arbitration to be a real and viable solution to the problems of the court system in Nigeria, its practice must be widely and evenly spread across the entire country. In other words, an uneven development of arbitration does not suffice for our purpose. This is because the problems of the Nigerian court system are not limited to a particular region or a particular area of law. For instance, the over clogged case list, the problem of delay as well as the issue of corruption and incompetence are not limited to any particular region. They are widespread in terms of location and subject matter. While attempts by States like Lagos may in fact reduce the pressure on their local courts, especially as it relates to commercial disputes, this still has little effect on the overall pressure at the central appellate courts. This is significant because cases from other States as well as non arbitrable cases in Lagos (or cases where the parties opted for the court system instead) still end up in the central appellate courts.<sup>32</sup> In effect, the only way to reduce the pressure as well as ensure an improved court system both at the courts of first instance and the appellate courts is to ensure that reforms and developments are evenly and comprehensively spread across the country. This can only be ensured by the Federal Government of Nigeria.<sup>33</sup>

Considering this point from another angle, allowing States to handle domestic arbitration proceedings will deprive the domestic practice of one of the most important advantages of international arbitration as against international litigation, which is the ease of enforcing international decisions arising by virtue of the New York Convention.<sup>34</sup> Bringing this issue home, as we mentioned in Chapter Two, the

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<sup>32</sup> For example, in Chapter Two, we highlighted the rise in the number of cases being instituted at the Oyo State High Court. This increase in cases, alongside those emanating from Lagos State (which is arguably making efforts), still proceeds to the common central appellate courts, thus getting stuck in the jam at the central level. This in other words defeats the efforts made by States like Lagos.

<sup>33</sup> In fact, attempts at judicial reforms must be evenly spread across all the States especially since by virtue of the Federal Character principle, the appellate courts at the centre must as a matter of necessity appoint from all the States (and not necessarily the best, most knowledgeable or most experienced Judges from proactive States). It is therefore necessary to ensure that attempts at judicial reforms are subjected to the same standards.

<sup>34</sup> By States, we are referring to one of the thirty-six States in Nigeria and not the States in the context of the provisions of the New York Convention 1958.

decision of a State High Court is not directly enforceable in another State High Court.<sup>35</sup> It is subject to each States individual requirements. This position does not however apply to the various Federal courts resident in different States.<sup>36</sup> The point being made here is that placing arbitration within the States jurisdiction will subject any award which is to be enforced outside the State where it was made, to the individual requirements of another Nigerian States arbitration framework. On the other hand, placing arbitration within the exclusive legislative list will aid an easy and quick enforcement process across the country (just like judgements of the Federal High Court, the National Industrial Court, the Court of Appeal and the Supreme Court),<sup>37</sup> thus encouraging the acceptability and development of arbitration in Nigeria.

We therefore suggest that the proposed law be provided for within the exclusive legislative list of the Nigerian Constitution. In other words, it is to be enacted as an Act of the National Assembly.<sup>38</sup>

### **1.3 The Nigerian Arbitration Centre**

Before going into details about the process of maintaining arbitration under our proposed framework, we advocate for the establishment of a statutory company, which will be known as the Nigerian Arbitration Centre ("NAC"), to administer and promote the practice of domestic arbitration in Nigeria. The Nigerian government has in the past set up statutory companies, with the sole aim of providing technical but cost effective expertise and solution to specific problems plaguing the nation. Only recently, the government set up the Asset Management Corporation of Nigeria ("AMCON") to acquire, manage and dispose the problem of non-performing loans in financial institutions, through a collaboration of the Ministry of Finance and the Central Bank of Nigeria but under the management of an independent and private

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<sup>35</sup> See Section 2.1 of Chapter Two; See also *Rivers State Government of Nigeria & Anor v. Specialist Consult* (2005) 3 SCM 140; *Ogbuanyinya v Obi Okudo* (1990) 7 SC (Pt 1) 68.

<sup>36</sup> This is because Federal courts are regarded as one, with jurisdiction throughout Nigeria. However, for convenience, the Federal High Court for example is divided into judicial divisions spread throughout Nigeria; See Section 249 (1) (2) of the 1999 Nigerian Constitution. See also Section 2.2 and 2.3 of Chapter Two of this thesis for a discussion on the Federal courts in Nigeria.

<sup>37</sup> See Section 2.2 -2.6 of Chapter Two for a discussion on this issue.

<sup>38</sup> The National Assembly is the Federal legislative arm while the House of Assembly is the State's legislative arm. See Sections 47 and 48 of the 1999 Nigerian Constitution.

Board of Directors. Under this arrangement, the government provides the financial support, especially as it relates to the payments of salaries of personnel,<sup>39</sup> while the private sector through the Board of Directors provides the expertise needed.

In the same vein, the proposed NAC will enjoy the financial backing of the Ministry of Justice but will be under the management of technocrats and professionals. The involvement of the government will no doubt and to a large extent reduce the cost of arbitration on parties. The government will also not be spending as much money as it would have spent if it had decided to appoint more Judges and build more courts, since parties who opt for arbitration will be bearing some of the cost of the process.

Admittedly, the cost implications of arbitration for parties may at the initial stages be more when compared to the litigation process.<sup>40</sup> However, as we will argue further on in this chapter, the situation in Nigeria is unique. Because of the problem of delay plaguing the Nigerian court system, an efficient and timely arbitration system may in fact be cheaper in the long run than the seemingly cheaper but complicated court process. For example, a litigation spanning over ten years will not only in all likelihood be more expensive than a shorter and efficient arbitration process, the former will probably result in irreparable damage both to business and personal relationship of parties.

In terms of administration, the everyday activities of the NAC will be undertaken by a Secretariat, which will be subject to the guidance and direction of a Board of Directors set up by law to govern the administration of the NAC. Adopting the situation in Ghana, members of the Board of Directors of the NAC will be appointed by the President of Nigeria. However, unlike the appointment process under the Ghanaian framework which seems to be arbitrary, under the NAC, the appointment will be made further to a nomination process made by relevant stakeholder organizations. The Board will consist of:

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<sup>39</sup> We believe that the involvement of the government will to a large extent reduce the cost of arbitration on parties.

<sup>40</sup> In the course of this chapter, we will also be suggesting other methods of reducing costs.

### **1.3.1. A Chairman**

The appointment of the chairman shall be made by the President of Nigeria, further to a nomination by other members of the Board of Directors. In nominating a chairman, members must take into consideration his/her professional experience and specialised knowledge of law, arbitration and business, which must have been gathered over a period of at least ten years.<sup>41</sup>

### **1.3.2. One Nominated Representative of the Nigerian Bar Association ("NBA")**

The Nigerian Bar Association is the national body of all lawyers in Nigeria.<sup>42</sup> The NBA will be expected to nominate three of its members to the Nigerian President, as its representatives on the Board. The Nigerian President will in turn be expected to appoint one out of the three nominees.

The reason for including lawyers on the Board is not farfetched. The proposed framework is expected to provide a viable alternative to litigation. It takes knowledge of the litigation process to be able to provide a framework that avoids some of the pitfalls of litigation.<sup>43</sup> Furthermore, unlike the other ADRs, the process and practice of arbitration requires the involvement of the law.

### **1.3.3. One Nominated Representative of the Nigerian Association of Chambers of Commerce, Industries, Mines and Agriculture ("NACCIMA").**

The NACCIMA is the umbrella organization for all City/State and Bilateral Chambers of Commerce within the Federal Republic of Nigeria.<sup>44</sup> The organisation seeks to advance business and economic growth in Nigeria. The

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<sup>41</sup> Ten years is the minimum experience required to be appointed as a Judge of a Superior Court of Record as well as to attain the rank of a Senior Advocate of Nigeria. See for example Sections 249 and 270 of the 1999 Nigerian Constitution.

<sup>42</sup> Official website of the Nigerian Bar Association <[www.nigerianbar.org.ng/](http://www.nigerianbar.org.ng/)> accessed 2 January 2016.

<sup>43</sup> Paul Idornigie, 'Overview of ADR in Nigeria' (2002) 73(1) Arbitration 73,76.

<sup>44</sup> Official website of the Nigerian Association of Chambers of Commerce, Industry, Mines and Agriculture <[www.naccima.com/](http://www.naccima.com/)> accessed 2 January 2016.

organisation also ensures that governmental policies and actions aid the development of business activities in Nigeria.

Unfortunately, as we have noted in Chapter Two and Four, the present legal system inhibits the development of business activities in Nigeria.<sup>45</sup> For example, apart from the negative effects of corruption and incompetence on business disputes, the present requirement for writing and signature makes the existing arbitration framework unable to cater for specialised types of contracts like bills of lading, companies' article of association and negotiable instruments, amongst others.<sup>46</sup> Involving the NACCIMA in the administration of the NAC will to a large extent enable the organization provide an arbitration service that is practical and useful to the business community in general.

The Nigerian President will be expected to appoint one out of three nominees to be put forward by the NACCIMA.

#### **1.3.4 *One Nominated Representative of the Nigerian Association of Small and Medium Enterprises ("NASME").***

The NASME brings together small and medium enterprise owners under one umbrella. The organization seeks to promote the development of micro, small and medium sized businesses in Nigeria.<sup>47</sup> This is very important especially when ones considers the level of economic development in Nigeria.

The relevance of the NASME cannot be overemphasised, especially since we seek to introduce a cost effective arbitration process. It is important to ensure that the framework appeals to the anticipated end users of the framework. One way of ensuring this is by involving the intended users in the administration of the process. Involving the NASME in the decision making and

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<sup>45</sup> See Section 3.0 of Chapter Three.

<sup>46</sup> This is because these agreements meet the writing and not the signature requirement as provided for in Section 1 of the Nigerian Arbitration and Conciliation Act.

<sup>47</sup> Micro Capital Universe, Nigerian Association of Small and Medium Enterprises (NASME) [<www.microcapital.org/microfinanceuniverse/tikiindex.php?page=Nigerian+Association+of+Small+and+Medium+Enterprises+\(NASME\)>](http://www.microcapital.org/microfinanceuniverse/tikiindex.php?page=Nigerian+Association+of+Small+and+Medium+Enterprises+(NASME)) accessed 2 January 2016.

administration of the NAC will to a large extent enable the latter to come up with policies that will appeal to local business owners, as well as provide awareness on the use of arbitration in the resolution of micro, small and medium scaled domestic disputes. The Nigerian President will be expected to appoint one out of three nominees to be put forward by the NASME.

### **1.3.5 *One Nominated Representative of the Council of Traditional Rulers.***

This is the recognised association of traditional rulers in Nigeria. We previously mentioned that in pre-colonial times, traditional rulers exercised supreme powers over the inhabitants within their jurisdiction. However, colonialism and the development of Nigerian law in general has changed the trend. Today, traditional rulers have no constitutionally recognised powers.

In view of some of the problems of the present court system, there have been calls by academics for the bestowal of judicial powers on traditional rulers.<sup>48</sup> While we do not agree with this call, we concede that their knowledge and wealth of experience especially as it relates to customary law may in fact be useful in the customary arbitration process. As we will see later on in this chapter, we redefine domestic arbitration to include customary arbitration. The Council will be expected to nominate one member to act on the board.

### **1.3.6 *A Representative of the Federal Ministry of Justice***

A representative of the Ministry of Justice will be included as a member of the Board of Directors not only because of their financial involvement in the project but also because of their role in the administration of justice in general.<sup>49</sup>

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<sup>48</sup> R. Blench, S. Longtau, U. Hassan and M. Walsh, 'The Role of Traditional Rulers in Conflict Prevention and Mediation in Nigeria: The final report (Report prepared for DFID 2006) 75 [www.rogerblench.info/Conflict/TR%20Interim%20Report.pdf](http://www.rogerblench.info/Conflict/TR%20Interim%20Report.pdf)> accessed 2 January 2016.

<sup>49</sup> In the course of this chapter, we highlight some of the duties and functions of the proposed NAC.

#### 1.4. The Domestic Arbitration Court

We advocate for the establishment of a Superior Court of Record known as the Domestic Arbitration Court, which will serve as a decision maker in disputes emanating from domestic arbitrations in Nigeria as well as provide any necessary support for international arbitrations with Nigerian seats.<sup>50</sup> In this sense, the DAC will be similar to the CCJA and in a way, the ICC's Court.<sup>51</sup> Like the CCJA, the DAC will have sole and final jurisdiction over arbitration disputes in Nigeria.<sup>52</sup>

As against the opinion that judicial intervention is the antithesis of arbitration,<sup>53</sup> we believe and submit that an effective and supportive court system will to a large extent encourage the development of arbitration in Nigeria.<sup>54</sup> In support of the former position, Thomas Carbonneau submits that, "the western, developed-state (and commercially predominant) view is that no matter its degree, judicial intervention in matters of trans-border or domestic arbitration is antagonistic to the autonomy and functionality of arbitration".<sup>55</sup> This writer however submits that there are a number of situations where a party independent of the entire proceeding is better suited to act as a decision maker. For example, by virtue of the fair hearing principle,<sup>56</sup> it is opined that an independent third party is better suited to deal with jurisdictional challenges involving the arbitration tribunal. As we argued in a previous chapter<sup>57</sup> (and will revisit shortly), an arbitrator technically has a stake and interest in the continuation of the proceeding, his fees and so he arguably has many reasons to perpetuate an

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<sup>50</sup> The extent of the courts' involvement in international arbitration will depend on the applicable international arbitration framework.

<sup>51</sup> For example, Article 14 of the ICC Arbitration Rules 2012 provides that any challenge of an arbitrator on the basis of impartiality, independence or otherwise, shall be determined by the ICC Court of Arbitration and so while the ICC's court may not be a court in the true sense of the word, we actually see the court performing specific but very limited decision making functions.

<sup>52</sup> This includes both domestic and international arbitration.

<sup>53</sup> Alan Reid, 'The UNCITRAL Model Law on International Commercial Arbitration and the English Arbitration Act: Are the Two Systems Poles Apart?' (2004) 21(3) *Journal of International Arbitration* 227,233.

<sup>54</sup> See Section 3.2 of Chapter Six.

<sup>55</sup> Thomas E Carbonneau, 'The Exercise of Contract Freedom-the Making of Arbitration Agreements' (2003) 36 *Vanderbilt Journal of Transnational Law* 1189, 1194.

<sup>56</sup> This is encapsulated in the latin principle *Nemo Judex in Causa Sua*, which when translated in English means that you cannot be a judge in your own cause.

<sup>57</sup> See Section 5.2 of Chapter Three.



otherwise invalid arbitration. Furthermore at this point, a huge conflict of interests could arise as regard the arbitrators, since as we have mentioned in Chapter Three, parties would usually appoint arbitrators who they believe will be sympathetic to their case.<sup>58</sup> In applications similar to this, we believe that the Domestic Arbitration Court is better suited to adjudicate.<sup>59</sup>

Furthermore, as Lord Peter Goldsmith submitted, there is need to have a supportive but independent judiciary with demonstrable experience in arbitration.<sup>60</sup> The existence of the DAC will dispense with the need to involve State High Courts in arbitration disputes.<sup>61</sup> As we have discussed in Chapter Four, the development of arbitration in Nigeria, especially domestic arbitration, is a recent trend, one which many lawyers and Judges in Nigeria are still trying to understand.<sup>62</sup> Unfortunately, as Olatawura rightly noted, many Judges in Africa lack the requisite knowledge of arbitration.<sup>63</sup> As we have seen in Chapter Two, many of the courts have ill equipped libraries.<sup>64</sup> Furthermore, arbitration as a subject remains untaught at the major law schools in Nigeria till date.<sup>65</sup>

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<sup>58</sup> For a more detailed and practical discussion on this issue, see- Jan Paulsson, 'Moral Hazard in International Dispute Resolution' (An Inaugural Lecture Delivered as Holder of the Michael R. Klein Distinguished Scholar Chair at the University of Miami School of Law on 29<sup>th</sup> April 2010). <[www.arbitration-icca.org/media/0/12773749999020/paulsson\\_moral\\_hazard.pdf](http://www.arbitration-icca.org/media/0/12773749999020/paulsson_moral_hazard.pdf)> accessed 30 April 2010.

<sup>59</sup> In the course of this chapter, we highlight other situations where we believe it is necessary to involve the DAC.

<sup>60</sup> Lord Peter Goldsmith, 'The London Principles 2015' (2015) 81(4) *Arbitration* 407, 410.

<sup>61</sup> In Chapter two, we mentioned that the State High Court has the widest jurisdiction in Nigeria. It is this court which presently has jurisdiction over issues relating to arbitration in Nigeria. See Section 272 of the 1999 Nigerian Constitution.

<sup>62</sup> Until recently, even the courts in developed jurisdictions like the United Kingdom and the United States of America were reluctant to "share" their jurisdiction with arbitrators. See Earl S. Wolaver, 'The Historical Background of Commercial Arbitration' (1934) 2 *University of Pennsylvania Law Review* 132, 138-144; Ernest Lorenzen, 'Commercial Arbitration-International and Interstate Aspects' (1934) *Yale Law School Scholarship Series, Paper* 4588 <[http://dogotalcommons.law.yale.edu/fss\\_papers/4588](http://dogotalcommons.law.yale.edu/fss_papers/4588)> 716,717; Herbert Syme, 'Arbitrability of Labour Disputes' (1951) 5(3) *Rutger Law Review* 45, 458; Janet Rosen, 'Arbitration under Private International Law: The Doctrine of Seperability and Competence de la Competence' (1994) 17(3) *Fordham International Law Journal* 599, 617.

<sup>63</sup> Olakunle O. Olatawura, 'Arbitration in Nigeria: From Theory to Practice' (1996) 7(9) *International Company and Commercial Law Review* 325, 328; Collins Namachanja, 'The challenges facing arbitral institutions in Africa' (2016) 82(1) *Arbitration* 44, 51.

<sup>64</sup> See Section 3.3 of Chapter Two.

<sup>65</sup> See for example, the list of courses offered at the Faculty of Law, University of Ibadan (Nigeria's premier university) <<http://law.ui.edu.ng/courseprivate>> accessed 12 June 2016.

To reduce the likelihood of erroneous decisions and encourage the smooth development of arbitration, there is need to ensure that decision makers on issues relating to arbitration possess the right mind-set and are equipped with the requisite knowledge and experience needed to decide issues effectively and efficiently. James Allsop in his article rightly submits that this not only involves an understanding of the law and practice of arbitration, but also of the perspectives and approaches that facilitate the smooth working of the arbitral system.<sup>66</sup> Any other attitude or position will stifle the development of domestic arbitration in Nigeria.

Like every other Federal Court, we suggest that the DAC be comprised of a President and as many Judges as are deemed necessary.<sup>67</sup> Potential members of the DAC will be subject to the same requirements and appointment process as that of other Federal Superior Courts of Record.<sup>68</sup> In other words, a DAC Judge will be expected to have a minimum of ten years post call experience. Unlike Federal and State High Court Judges who are expected to have general experience but like National Industrial Court Judges who are expected to have labour law experience,<sup>69</sup> a DAC Judge must have considerable experience acting as an arbitrator and/or arbitration lawyer. A Judge of the DAC will be appointed by the President of Nigeria upon the recommendation of the National Judicial Council and upon the confirmation of the Senate.<sup>70</sup>

In the course of this chapter, we highlight some of the functions of the DAC.

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<sup>66</sup> James Allsop, 'Courts and arbitrators as partners in the international dispute resolution project' (2015) 81(4) *Arbitration* 413, 436.

<sup>67</sup> We should point out in passing that this is not the first time that a special court has been set up to take care of specific kinds of issues in Nigeria. For instance, we have the National Industrial Court (NIC), which was reintroduced to administer trade disputes between employers and employees, trade unions and workers, workers and even between trade unions. This was in response to the long (ranging between two and ten months) and periodic strikes spearhead by labour unions like the National Labour Congress (NLC) and the Academic Staff Union of Union (ASSU), during which economic and educational activities were grounded to a complete halt.

<sup>68</sup> See the Revised NJC Guidelines and Procedural Rules for the Appointment of Judicial Officers of All Superior Courts of Record in Nigeria, November 2014.

<sup>69</sup> See Sections 250(3) and Section 271(3) of the 1999 Nigerian Constitution.

<sup>70</sup> *ibid* section 251 of the 1999 Nigerian Constitution.

## 2.0 STRUCTURE OF THE PROPOSED DOMESTIC ARBITRATION ACT.

In terms of contents, we would approach this discussion from what Redfern and Hunter have regarded as the fundamental elements of arbitration.<sup>71</sup> We however also include a Preamble section in the proposed framework.

### 2.1 The Preamble

Unlike the existing Nigerian Arbitration and Conciliation Act, we introduce a Preamble into the Proposed Domestic Arbitration Act (PDAA). We believe that since a Preamble states the objectives of the Act, it will serve as a useful reference point in controversial situations, where there is need to fill gaps in the law and/or interpret ambiguous aspects of the framework.<sup>72</sup> In his discussion on the *Preamble Section of the English Arbitration Act 1996*, Tobi Landau submits that “...whenever any section leaves room for doubt on interpretation, reference must be made back to this principles, rather than embarking on a cold textual analysis of specific provisions in the abstract...”<sup>73</sup> Our Preamble therefore sets the theme of this proposed framework.

In view of the economic situation in Nigeria, we model our Preamble provision closely after *Section 1 of the English Arbitration Act 1996*, which has cost and efficiency as its focal points. The intention of the PDAA will therefore be to provide and promote the use of a cost effective domestic arbitration framework in Nigeria. Parties have the unfettered right to determine the process by which their disputes will be administered, subject only to any mandatory provision, which we highlight in this thesis. For example, any ambiguous or contentious part of this framework should be interpreted in a way that encourages the development of domestic arbitration as well as promotes a cost effective process.

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<sup>71</sup> Nigel Blackaby et al (n 5) 14.

<sup>72</sup> In *Ogbonna v. Attorney General of Imo State* (1992) 2 SCNJ 26, the Nigerian Supreme Court held that Preambles should only be relied upon to clarify ambiguity. However, where the provisions of the framework in question is clear and unambiguous, it should be given its ordinary meaning; See *Obomhense v Erhanon* (1993) 7 SCNJ 479, *Dikko Yusuf & Anor v Olusegun Obasanjo & Ors* (2004) 5 SCM 174-175; *Awuse v Odili* (2003) 12 SCM 27.

<sup>73</sup> Tobi Landau, ‘United Kingdom: Arbitration Act of 1996’ (1997) 36(1) International Legal Materials 155, 156.

## 2.2 The Agreement

The significance of the agreement in arbitration proceedings cannot be overstated. As we have seen in Chapter Three, the arbitration agreement evidences the consent of the parties to submit their dispute to arbitration.<sup>74</sup> While State courts derive their jurisdiction either from statutory provisions or a jurisdiction agreement, the arbitration tribunals' jurisdiction is based solely on the parties' agreement to submit their dispute to arbitration.<sup>75</sup> The underlying idea behind arbitration and the enforceability of the agreement, is party autonomy.<sup>76</sup> To constitute a proper arbitration procedure which can be enforced, there must be an agreement to submit the matter to arbitration.<sup>77</sup> This agreement may either be included as a clause in the head contract or may be reached subsequent to the contract and/or dispute. A jurisdiction like China also specifically requires that certain information be included in the arbitration agreement. This includes the following: a clear intention to arbitrate, it should also state the matters within the scope of the arbitration as well as name the designated arbitration commission, if any.<sup>78</sup>

### 2.2.1 A Flexible Arbitration Agreement

As we have seen at various points in this thesis, the frameworks in many countries in Africa (and even the world in general)<sup>79</sup> like Nigeria,<sup>80</sup> Ghana,<sup>81</sup> Egypt<sup>82</sup> and the OHADA region,<sup>83</sup> insist on a written arbitration agreement. Hong – Lin Yu rightly notes that a strict requirement of form can in certain instances be the antithesis of

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<sup>74</sup> See Section 3.0 of Chapter Three; See also Lew, Mistelis and Kroll, *Comparative International Commercial Arbitration* (Kluwer Law International 2003) 100.

<sup>75</sup> Emmanuel Gaillard and John Savage (eds), *Fouchard Gaillard Goldman on International Commercial Arbitration* (Kluwer Law International 1999) 1; See also Julian D.M Lew QC, 'Introduction: Fundamental Problems in International Arbitration' in Julian D.M Lew and Loukas A. Mistelis, *Pervasive Problems in International Arbitration* (Kluwer Law International, 2006) 5.

<sup>76</sup> It has been referred to as the cornerstone of arbitration; See Christopher Lau and Christen Horlack, 'Party Autonomy-The Turning Point' (2010) 4 *Dispute Resolution International* 121.

<sup>77</sup> *Commerce Assurance Limited v. Alli* (1992) 4 SCNJ 145.

<sup>78</sup> See Article 16 of the Chinese Arbitration Law 1994, which expects parties to clearly define the matters which should be submitted to arbitration.

<sup>79</sup> See for example, Section 5 of the English Arbitration Act 1996.

<sup>80</sup> Nigerian Arbitration and Conciliation Act, section 1.

<sup>81</sup> Ghanaian ADR Act 2010, section 2(3).

<sup>82</sup> Egyptian Arbitration Law, No 27 of 1994, article 12.

<sup>83</sup> Uniform Act on Arbitration 1999, article 3.

arbitration.<sup>84</sup> For example, while the writing requirement in a developed and more enlightened jurisdiction like the United Kingdom may on the face of it seem very reasonable, proponents of the revised model law have rightly pointed out that the requirement and drafting of a written arbitration agreement were in a number of situations either unreasonable or virtually impossible.<sup>85</sup> The revolution in communication and methods of contracting especially in the area of electronic commerce has created an urgent need to reconsider the notion of a written agreement.<sup>86</sup> Unfortunately, Nigeria not only prescribes a written arbitration agreement, it also requires that the agreement must also be signed by parties, thus worsening an already bad requirement.<sup>87</sup>

In a developing country such as Nigeria, which as we have seen in Chapter Four still suffers widespread illiteracy, the writing and signature requirements are to say the least, very unacceptable.<sup>88</sup> This is especially as Nigerian law recognizes the validity of oral contracts.<sup>89</sup> These mandatory requirements not only contradict the peculiarities of the Nigeria nation, they are also anachronistic and inconsistent with accepted arbitration practices.<sup>90</sup> Furthermore, the writing and signature requirements automatically invalidates arbitration agreements contained in specialised types of contracts like bills of lading, articles of associations and negotiable instruments, which even though are evidenced in writing, are usually not signed by parties.

Flowing from the above, and taking into consideration the level of education in Nigeria, we adopt the more flexible definition of arbitration agreements encapsulated in *Option two of Article 7 of the Revised Model law*, which defines a valid arbitration

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<sup>84</sup> Hong-Lin Yu, 'Written Arbitration Agreements – What Written Arbitration Agreements?' (2013) 32(1) Civil Justice Quarterly 68, 69.

<sup>85</sup> See Section 3.2 of Chapter Six; See also UNCITRAL Model Law on International Commercial Arbitration 1985 With amendments as adopted in 2006, 28 <[www.uncitral.org/pdf/english/texts/arbitration/ml-arb/07-86998\\_Ebook.pdf](http://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/07-86998_Ebook.pdf)> accessed 9 September 2015.

<sup>86</sup> Di Anne-Marie Gobhams and Niccole Landi, 'Arbitration Agreements: Written Form Requirements and New Means of Communication' (2014) 4 Bocconi Legal Papers 221,222.

<sup>87</sup> See Section 1 of the Nigerian Arbitration and Conciliation Act.

<sup>88</sup> See Section 5.1 of Chapter Four.

<sup>89</sup> This is especially as the Nigerian law recognizes the validity of oral contracts. See Section 125 of the Evidence Act 2011.

<sup>90</sup> See Section 5 of the English Arbitration Act 1996; Section 2(3) of the Ghanaian ADR Act 2010; Article 12 of the Egyptian Arbitration Law, No 27 of 1994; Article 3 of the Uniform Act on Arbitration 1999.

agreement in a way that includes both oral and written arbitration agreements. The PDAA will therefore be able to cater for domestic arbitration agreements, both written and unwritten, as well as customary arbitrations, which many times arise from an unwritten agreement. Very importantly, by adopting this flexible approach, our proposed framework is able to cater for the large number of uneducated but wealthy Nigerian business men who still transact their businesses orally.<sup>91</sup>

Besides, since the general policy of the courts is to hold parties to their bargain in cases where parties have agreed to resolve their disputes via arbitration<sup>92</sup> and because arbitration is based on the mutual intent, convenience and commitment of parties to resolve their dispute via arbitration, the emphasis being placed by many frameworks on the form of the arbitration, is overrated and not very important as long there are alternative but credible ways of establishing the existence of the agreement.<sup>93</sup>

Admittedly, parties' rights of access to the court is a fundamental right<sup>94</sup> and so caution must be applied in situations where there is controversy as to the existence of an oral arbitration agreement.<sup>95</sup> Marie Ni Shuilleabhain opines that the writing requirement not only ensures certainty and by implication unnecessary litigation, it also prevents parties from committing the offence of perjury.<sup>96</sup> In addition, Professor Ilias Bantekas also rightly points out that "the difficulty with oral agreements to arbitrate is that they provide a limited degree of legal certainty, particularly in the absence of any verifiable record of the agreement. In such cases, how does one prove or disprove the existence of an agreement to arbitrate?"<sup>97</sup>

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<sup>91</sup> The law in so-called developed countries, also recognises oral agreements in specific situations. In the United Kingdom for example, leases below three years can be entered into orally. Leases above three years should be evidenced in writing. See Section 54 of the Law of Property Act 1925. The point being made here is that there are circumstances where the law has deemed an oral contract to be enough to bind parties. Of course, as the risks and interest increase, the law requires more proof, that is writing.

<sup>92</sup> *The owners of the M.V Lupex v. Nigeria Overseas Chartering & Shipping Ltd* (2003) 10 SCM 71

<sup>93</sup> Di Anne-Marie Gobhams and Niccole Landi (n 86) 236.

<sup>94</sup> Section 36 of the 1999 Nigerian Constitution.

<sup>95</sup> Laurence Boo, 'The writing requirement in contemporary practice: is there really a need for change' (2008) 2 *Dispute Resolution International* 75, 78.

<sup>96</sup> Marie Ni Shuilleabhain, 'Formalities of Contracting: A Cost Benefit Analysis of Requirements that Contracts be Evidenced in Writing' (2005) 27 *Dublin University Law Journal* 10, 15.

<sup>97</sup> Ilias Bantekas, *An Introduction to International Arbitration* (Cambridge University Press 2015) 73.

Different jurisdictions have approached this question from different angles. For example, in Scotland, the determination of an oral arbitration agreement is on a balance of probabilities. This requires the party alleging the existence of the agreement to prove that the fact in question is more likely than not, even if marginal so.<sup>98</sup>

In answering Professor Bantekas's question as it relates to this framework, we take a cue from the existing practice in Nigeria. We submit that the pre-existing rules of evidence applicable to the proof of oral contracts are also applicable to the proof of oral arbitration agreements. An oral arbitration agreement will therefore be expected to be proved by the evidence of anyone who saw<sup>99</sup> or heard<sup>100</sup> parties entering into an agreement. Like every other oral agreement in Nigeria, it will be up to the court to determine the weight that will be attached to such an evidence. Applying the provisions of the Nigerian Evidence Act, the only time when an oral agreement will not be acceptable is where there is written evidence on the subject or issue that is sought to be proved.<sup>101</sup> However as Laurence Boo rightly submitted, any doubt as to the voluntary surrender of this right must be decided in favour of the party who is challenging the validity of the arbitration agreement.<sup>102</sup>

Notwithstanding the above, we prescribe a limit to the scope of oral agreements. Specifically, disputes involving a sum in excess of ten million naira<sup>103</sup> will need to be evidenced by a written arbitration agreement. We borrow a leaf from the Lagos State Magistrate Court Law of Lagos State, which gives Magistrate courts in Lagos State wide jurisdiction over a claim arising from any contract or tort but limits the scope of the court's jurisdictions to disputes below ten million naira.<sup>104</sup> This is in view of the

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<sup>98</sup> See the case of *Miler v Minister of Pensions* (1947) 2 All ER 372, 374.

<sup>99</sup> Evidence Act 2011, section 126(a).

<sup>100</sup> *ibid* section 126(b).

<sup>101</sup> *ibid* section 125; However, Section 128 of the said Evidence Act somewhat qualifies the said section by providing that the existence of a written memorandum is not enough to disprove an oral agreement, especially when the memorandum was not intended to have legal effect as a contract.

<sup>102</sup> Laurence Boo (n 95) 75.

<sup>103</sup> This is about twenty-four thousand, three hundred pounds (£24,300) pounds. While this amount seems meagre especially when converted to pounds, it must be pointed out that it is a lot of money by Nigerian standards. At the moment, the legal monthly minimum wage in Nigeria payable by the government is eighteen thousand naira (18,000), which when converted is about forty-two pounds (£42).

<sup>104</sup> Magistrate Court Law of Lagos State 2009, section 28.

level of risks associated with transactions of this magnitude. There is no doubt that writing still provides the best evidence of an arbitration agreement.

We retain the existing *Section 1 (2) of the existing Nigerian Arbitration Act*, which allows parties to incorporate an arbitration agreement from an external source. By this, parties are also able to orally incorporate written arbitration agreements into their existing contractual arrangement. As can be deduced from the foregoing, we place less emphasis on the form of the agreement as long as the existence of the agreement can be established through any means including written evidence.<sup>105</sup>

In a situation where parties orally incorporate a written arbitration agreement, such an agreement will be categorised as a written arbitration agreement. Where the validity of an agreement is in question, we adopt the approach in England and the *Brussels 1 Regulation (Recast)* as a guide. The approach in England is to determine the validity of the agreement through the lens of the putative law, that is, the law which would have governed the arbitration agreement if it were valid. Similarly, the *Brussels 1 Regulation (Recast)*<sup>106</sup> also provides that any question as to whether a jurisdiction agreement is null and void as to its substantive validity, will be determined by the law of the member state identified in the jurisdiction agreement. By virtue of *Article 25(5) of the Regulation*, the provision of the head contract dealing with jurisdiction is regarded as separate and/or independent from the other terms of the contract.<sup>107</sup>

Like the situation in many arbitration jurisdictions,<sup>108</sup> we also recommend the deletion of the part of *Section 2 of the Nigerian Arbitration Act*, which allows courts to revoke parties' arbitration agreement without their consent.<sup>109</sup> We strongly believe that this

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<sup>105</sup> Stephen J. Choi, 'The Problem of Arbitrator Agreement' (2003) 36 *Vanderbilt Journal of Transnational Law* 1233, 1235.

<sup>106</sup> See Article 25(1) of the *Brussels 1 Regulation (Recast) on Jurisdiction and the Recognition and Enforcement of Judgements in Civil and Commercial Matters*. The Regulation came into effect on the 10<sup>th</sup> of January 2015.

<sup>107</sup> It would seem that the idea behind Article 25(5) of the *Brussels 1 Regulation (Recast)* is similar to that applied in the relationship between the head contract and the arbitration agreement.

<sup>108</sup> See for example Section 3(2) of the *Ghanaian ADR Act 2010* and Section 9 of the *English Arbitration Act 1996*.

<sup>109</sup> Section 2 of the *Nigerian Arbitration Act* provides that an arbitration agreement can be revoked by leave of court or by the agreement of parties.



is a violation of parties' right and autonomy to opt for arbitration.<sup>110</sup> Similarly and like many jurisdictions,<sup>111</sup> we also delete the discretionary and unlimited right of the Nigerian courts to decide whether or not to stay litigation proceedings even in the face of a validly made domestic arbitration agreement as provided in *Section 5 of the Act*.<sup>112</sup> Our position is based mainly on the court's legal duty and obligation to protect the contractual rights and duties of parties as contained in their arbitration agreement, subject to the application of the principle of arbitrability.<sup>113</sup>

### 2.2.2 *Parties' Capacity*

Because of the fundamental nature of the right of access to the court, it is important that parties to an arbitration agreement have the capacity to understand the import and significance of their decision to opt out of the protection and benefits of the court.<sup>114</sup> In litigation, as a general rule, only natural adult persons and artificial persons, that is to say human beings and bodies corporate<sup>115</sup> are competent to sue and be sued before any law court in Nigeria.<sup>116</sup> Under Nigerian law, it is generally assumed that at eighteen, an individual is old enough to make right decisions.<sup>117</sup>

Adopting this litigation principle for our present purpose, we submit that parties to a valid arbitration agreement must be eighteen and above. We strongly believe that because of the fundamental nature of parties' right of access to the courts, it is

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<sup>110</sup> See Section 5.2 of Chapter Four for a detailed discussion on this issue.

<sup>111</sup> For example, see Section 9 of the English Arbitration Act 1996; See also, *Channel Tunnel Group Ltd v Balfour Beatty Construction Ltd* (1993) 2 WLR 262; *David Wilsons Homes v Survey Service Ltd* (2001) EWCA Civ 34.

<sup>112</sup> See Section 5.2 of Chapter Four.

<sup>113</sup> James Maples and Tim Goldfarb, 'Antisuit Injunctions: Expanding Protection for Arbitration under English Law' (2013) *Dispute Resolution International* 169.

<sup>114</sup> Generally, this question can be asked both at the beginning and the end of the arbitration. For example, see Articles 8(1) and 36(1) (a) of the Revised Model Law 2006. Specifically, Article 36(1) (a) allows the court to refuse recognition and enforcement of an award if it can be proven that one of the parties to the said agreement is under some form of incapacity as defined by the applicable law.

<sup>115</sup> Admittedly, the ability of a company to enter into a valid agreement may arguably be subject to restrictions contained in the Memorandum and Articles of Association of the company. These may contain restrictions on the subject matter capable of being resolved via arbitration or the official capable of binding the company.

<sup>116</sup> See *The Administrator/Executors of the Estate of General Sani Abacha v Samuel David Eke-Spiff* (2009) 2-3 SC (Pt II) 93; *Ataguba & Co v Gura* (2005) 2 SCM 47; *Fawehinmi v NBA* (1989) 4 SC (Pt 1)1.

<sup>117</sup> Under Nigerian law, age eighteen is the official adult age for most purposes. For example, it is at age eighteen that a person is allowed to vote. See Section 12(1) (b) of the Electoral Act 2010 Government Notice No 365.

important that parties are old enough to understand the significance of opting out of the protection provided by the court. In addition, parties to an arbitration must also at the time of entering into the agreement have the mental capacity to understand the significance of their agreement.<sup>118</sup>

This point on capacity is slightly different from the litigation practice where infants or people with limited capacity can institute proceedings through their guardians or representatives.<sup>119</sup> The difference lies in the fact that unlike litigation, an agreement is fundamental to the existence of an arbitration and since infants and persons with limited capacity are unable to enter into a legally binding agreement, there is nothing for their guardian or representatives to act upon on their behalf. An acceptable exception will be when the mental incapacity occurred after the execution of the arbitration agreement or in a situation in which it can be proven that the arbitration agreement was made during a lucid moment. In that case, a personal representative may act on his/her behalf. In relation to foreign companies, under Nigerian law foreign companies are capable of instituting cases before Nigerian courts and we see no real reason why this principle should not also apply to arbitration proceedings.<sup>120</sup>

The courts in the United State have exceptionally recognised the rights of third parties (to an arbitration agreement) to institute arbitration proceedings against signatories to the arbitration agreement. For example, in *Kastner v. Vanbesto Scandanavia AB and Iceberg Inc.*,<sup>121</sup> a court stayed a litigation proceeding (in favour of arbitration) filed against a third party (to an arbitration agreement) who happened to be a subsidiary of one of the parties to the arbitration agreement. In arriving at this decision, the court took into consideration the relationship between all the parties, the dispute and the

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<sup>118</sup> This in other words excludes people with any form of mental disability except it can be proven that such an agreement was made during a lucid moment.

<sup>119</sup> See Order 13 Rules 9 & 10 and Order 10 Rule 11 of the Lagos High Court Civil Procedure Rules 2012 as well as Order 12 Rules 9 and 10 and Order 11 Rule 12 of the High Court of the FCT 2009.

<sup>120</sup> *Saeby Jernstoberi Maskinfabric A/S v. Olaogun Enterprises Ltd* (1999) 12 SCNJ; *Bank of Baroda v Iyalabani Company Limited* (2002) 12 SCM 29.

<sup>121</sup> (Case No 5 14-CV-14) 2014 WL 6682440, 2014 U.S. Dist. LEXIS 165915 (District of Vermont).

head contract, before referring parties to arbitration. Consequently, the claimant was equitably estopped from avoiding the arbitration against a third party.<sup>122</sup>

While this development may in exceptional situations have its advantages,<sup>123</sup> we submit that for the purposes of our proposed framework, it is difficult to prescribe a default and/or encompassing rule. We therefore submit that the rights of third parties to invoke an arbitration agreement which they are not a party to should be determined by the DAC on a case by case basis. It is important to allow the DAC (and not the tribunal), especially at this initial stages, deal with such applications in order to enable the law and precedent in this area to develop in Nigeria.

General situations and rules have emerged which we believe can assist the DAC in determining whether or not to join a third party.<sup>124</sup> The most popular seems to be the Group of Companies doctrine, which appears to have been the underlying idea behind the decision in the aforementioned *Kastner v. Vanbesto Scandinavia AB and Iceberg Inc.*<sup>125</sup> As a counter to this doctrine, it is possible to argue that it negates the corporate personality doctrine which seeks to contain liability to a particular corporate entity. In practice and as Redfern and Hunter noted, this will to a large extent depend on the construction of the agreement in dispute as well as the circumstances surrounding the formation and performance of the underlying contract.<sup>126</sup> This again reaffirms our previous position that this issue of the joinder of third parties be determined on a case by case basis and not as a general rule.

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<sup>122</sup> Bull and Mink have advised that parties who wish to preserve their right to institute court claims against non-signatories to an arbitration agreement may wish to include language in their agreement which expressly limits their obligation to arbitrate against an entity other than the counterparty to the arbitration agreement. According to these commentators, such language may be helpful if it becomes necessary to convince the court that it would not be right in allowing a non-signatory to enforce the arbitration agreement against them. See Ryan Bull and Noah Mink, 'Non Signatory Permitted to Invoke an Arbitration Agreement: Examples of the Application of Equitable Estoppel in the US' (2016) 19(1) International Arbitration Law Review 4, 6.

<sup>123</sup> This will mostly revolve around issues of fairness as well as the circumstances of the case. This issue is discussed in more detail in Nigel Blackaby et al (n 5) 86 -90.

<sup>124</sup> For example, we have the Group of Companies, Piercing the Corporate Veil, Third Party Beneficiaries of Rights under a Contract and the Assignment, Agency and Succession doctrines respectively. See Nigel Blackaby et al (n 5) 86 -90; Ilias Bantekas (n 97) 92-95.

<sup>125</sup> (Case No 5 14-CV-14) 2014 WL 6682440, 2014 U.S. Dist. LEXIS 165915 (District of Vermont).

<sup>126</sup> Nigel Blackaby et al (n 5) 86.

### 2.2.3 Separability of the Arbitration Agreement.<sup>127</sup>

As we have highlighted at various points in this thesis, the doctrine of separability has suffered a chequered history.<sup>128</sup> We pointed out that there used to be two major approaches or schools of thought on the doctrine: the one contract theory and collateral contract theory.<sup>129</sup> While the former assumes that the contract and arbitration agreements are one and therefore should be governed by the law governing the contract, the latter holds that the arbitration clause is a separate agreement collateral to the main contract.<sup>130</sup>

One other possible way of approaching the doctrine of separability is what this writer refers to as the hybrid separability approach. By this approach, we assume that the contract and arbitration clause are governed by the same law but that the doctrine of separability should only apply if and when the legality or validity of the head contract is in question.<sup>131</sup> Admittedly, the validity of this third approach is rooted in whether or not the arbitration agreement is able to stand on its own. If it cannot, then both the

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<sup>127</sup> For a full discussion on the development and principle of the separability doctrine, see Arthur Nussbaum, 'The Separability Doctrine in America and Foreign Arbitration' (1934-1940) *New York University Law Quarterly Review* 609; Adam Samuel, 'Separability in English Law- Should an Arbitration Clause be regarded as an agreement separate and collateral to a contract in which it is contained?' (1986) 3(3) *Journal of International Arbitration* 95; Kaj Hober and Annette Magansson, 'The Special State of Agreements to Arbitrate- The Separability Doctrine: Mandatory Stay of Litigation' (2008) 2 *Dispute Resolution International* 56; Rogers and Launders, 'Separability: The indestructible Arbitration Clause' (1994) 10 *Arbitration International* 71; Svernlou, 'What isn't, aint: The Current Status of the Doctrine of Separability' (1991) 8 *Journal of International Arbitration* 37.

<sup>128</sup> See our previous discussion in Section 3.2 of Chapter Six for discussions on *Harbour Assurance Co v Kansa General International Insurance Co* (1992) as well as *Fiona Trust v. Privalov* (2006) EWHC 2583; In France, the doctrine was established in *Societe Gosset v Societe Curapuli*, Judgement of May 7 1963, *Cans. Civ. Ire*, 1963 *Bull Civ* 1, Nov 246, 208; In Russia, the doctrine was established in *Sojuzneftexport v JOC Oil Company* (1987) 2 *International Arbitration Report*. See also Adam Samuel, 'Separability in English Law- Should an Arbitration Clause be regarded as an agreement separate and collateral to a contract in which it is contained?' (1986) 3(3) *Journal of International Arbitration* 95, 98; Arthur Nussbaum, 'The Separability Doctrine in America and Foreign Arbitration' (1939-1940) 17 *New York University Law Quarterly Review* 609.

<sup>129</sup> See Section 4.2 of Chapter Six.

<sup>130</sup> Some legal systems like Sweden used to require that an arbitration agreement appear in a separate document signed by both contracting parties. See Hober, 'The Doctrine of Separability Under Swedish Arbitration Law, Including Comments on the Position of American and Soviet Law' (1983) 68 *Swedish Law Journal* 257, 259.

<sup>131</sup> As we argued in Section 3.2 of Chapter Six, this is one interpretation, though arguable, that can be made of Section 7 of the English Arbitration Act 1996.

collateral contract and our hybrid approach are defeated. If it can stand on its own, then there is really no use for the hybrid approach in the first place.

The most acceptable conclusion seems to be that the arbitration agreement can and should stand on its own. Philippa Charles puts it very nicely when she opined that the arbitration agreement is ring fenced from the contract within which it sits and should therefore be interpreted and applied on its own terms and not by reference to or in association with the other clauses of the host contract.<sup>132</sup> The validity or invalidity of the arbitration agreement should therefore be determined by factors arising or relating to the arbitration agreement itself and not from the contract.

The idea behind the doctrine of separability is simple:<sup>133</sup> an agreement should not be made invalid by virtue of a problem with the contract.<sup>134</sup> This is based on the premise that arbitration clauses which stipulate that disputes arising in relation to the contract be submitted to arbitration, impliedly endorse and support the doctrine.<sup>135</sup> Lord Hoffman<sup>136</sup> explained that “the construction of an arbitration clause should start from the assumption that the parties as rational businessmen are likely to have intended any dispute arising out of the relationship into which they have entered or purported to enter, to be decided by the same tribunal. The clause should be construed in accordance with this presumption unless the language makes it clear that certain questions were intended to be excluded from the arbitration jurisdiction.”<sup>137</sup>

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<sup>132</sup> Philippa Charles, ‘The Proper Law of the Arbitration Agreement’ (2014) 80(1) *Arbitration* 55, 56.

<sup>133</sup> Interestingly, the New York Convention 1958 does not expressly address the issue of separability.

<sup>134</sup> Zeb-Michael Curtis, ‘Rethinking Prima Paint Separability in Today’s Changed Arbitration Regime: The case for Inseparability and Judicial Decision Making in the Context of Mental Incapacity Defences’ (2004-2008) 90 *IOWA Law Review* 1905, 1916; Kaj Hober and Annette Magansson, ‘The Special State of Agreements to Arbitrate - The Separability Doctrine: Mandatory Stay of Litigation’ (2008) 2 *Dispute Resolution International* 56.

<sup>135</sup> A. Gardner, ‘The Doctrine of Separability in Soviet Arbitration Law: An analysis of *Sojuzneftexport v JOC Oil Co*’ (1990) 28 *Columbus Journal of Transnational Law* 301, 304.

<sup>136</sup> *Fiona Trust v. Privalov* (2007) UKHL 40.

<sup>137</sup> This presumptive approach is said to be intended to give effect to the commercial purpose of arbitration agreements, namely to refer all disputes arising out of parties’ relationship to arbitration, rather than leaving same to the national courts. See Joachim Delaney and Katharina Lewis, ‘The Presumptive Approach to the Construction of Arbitration Agreements and the Principle of Separability- English Law Post *Fiona Trust* and Australian Law Contrasted’ (2008) 3 *U.N.S.W.L.J.* 341, 345.

In addition, Adam Samuel argued that an arbitration agreement in a contract contains a different type of obligation from other terms of the contract.<sup>138</sup> For example, it does not have primary obligations. In other words, the application of the arbitration agreement does not relate to the performance of the contract. Instead an arbitration agreement evidences an intention by parties to resolve any dispute emanating or relating to the validity and/or operation of their contract via arbitration.<sup>139</sup> Furthermore, it does not contain secondary obligations.<sup>140</sup> The contract and arbitration agreement serve different functions and so should be made to stand on their own.<sup>141</sup>

The doctrine of separability has evolved into a useful tool that secures and protects not only parties' agreement to arbitrate but also the efficacy of arbitration proceedings.<sup>142</sup> Francis Okanigbuan rightly opined that "the separability doctrine enhances the confidence of parties in commercial transactions, on the basis that while disputes are inevitable, a quick and sustainable mechanism for resolving the same will at least suffice".<sup>143</sup> The doctrine therefore not only enhances the development of commercial relations, it also prevents the breakdown of law and order. No wonder it has become a popular feature of the arbitration framework in many jurisdictions.<sup>144</sup>

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<sup>138</sup> Adam Samuel, 'Separability in English Law- Should an Arbitration Clause be regarded as n agreement separate and collateral to a contract in which it is contained?' (1986) 3(3) *Journal of International Arbitration* 95, 109.

<sup>139</sup> This provides a pragmatic option of protecting parties' intention to arbitrate; See Kaj Hober and Annette Magansson, 'The Special State of Agreements to Arbitrate- The Separability Doctrine: Mandatory Stay of Litigation' (2008) 2 *Dispute Resolution International* 56, 74.

<sup>140</sup> This refer to obligations arising as a result of a party's failure to perform his/her primary obligations. Liquidated damages is a common example.

<sup>141</sup> The exception of course would be when the illegality affecting the head contract also extends to the arbitration agreement. For example, where both the contract and the arbitration agreement are found to have been procured by fraud.

<sup>142</sup> Kaj Hober and Annette Magansson (n 139) 56.

<sup>143</sup> Francis A. Okanigbuan, 'Revisiting the Separability Doctrine and Parties Right to Litigation in Commercial Transactions' (2015) 26(8) *International Company and Commercial Law Review* 255, 259.

<sup>144</sup> See Article 4 of the Uniform Act on Arbitration 1999; Section 7 of the English Arbitration Act 1996; Section 16 of the Indian Arbitration and Conciliation Act 1996; Section 6 of the Brazilian Arbitration Act 1996.

In conclusion, in line with the existing Nigerian Act<sup>145</sup> as well as Nigerian case law,<sup>146</sup> we retain the approach which clearly provides for the independence of the arbitration agreement from the main contract.<sup>147</sup> As discussed in previous parts, the doctrine suggests that the invalidity of the contract does not necessarily invalidate an embedded arbitration agreement.<sup>148</sup>

#### 2.2.4 Submission Agreements

As we have seen in the course of this thesis, submission agreements refer to agreements to arbitrate which are reached after the dispute has arisen.<sup>149</sup> While jurisdictions like Nigeria, England and Ghana recognise this practice, Tra Pham and Marie Hudson pointed out that under strict Islamic law, the binding effect of the

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<sup>145</sup> Section 12(2) of the Nigerian Arbitration and Conciliation Act; Mark McNeill, 'Doctrine of Separability and Consent to Arbitration' (2008) 24(3) *Arbitration International* 475; Adam Samuel, 'Separability in English Law- Should an Arbitration Clause be regarded as an agreement separate and collateral to a contract in which it is contained?' (1986) 3(3) *Journal of International Arbitration* 95; Adam Samuel, 'Separability and Construing Arbitration Clauses: The House of Lords Decision in *Premium Nafta and the Fiona Trust*' (2008) 24(3) *Arbitration International* 489; Peter Gross, 'Separability Comes of Age in England: *Harbour v Kansa* and Clause 3 of the Draft Bill' (1995) 11(1) *Arbitration International* 85; Phillip Landolt, 'The Inconvenience of Principle: Separability and Kompetenz-Kompetenz' (2013) 30(5) *Journal of International Arbitration* 511; Carl M. Svernlöv, 'The Evolution of the Doctrine of Separability in England: Now Virtually Complete? The Doctrines of Separability of the Arbitration Agreement' and *Competence de la Competence*' (1992) 9(3) *Journal of International Arbitration* 115; Joachim Delaney and Katharina Lewis, 'The Presumptive Approach to the Construction of Arbitration Agreements and The Principle of Separability-English Law Post *Fiona Trust* and Australian Law Contrasted' (2008) 3 *U.N.S.W.L.J.*, 341.

<sup>146</sup> *Royal Exchange Assurance v. Bentworth Finance (Nig) Ltd* (1976) 11 SC 107; *Nigerian National Petroleum Corporation V. Klifco Nigeria Limited* (2011) 4 SC (Pt 1) 108

<sup>147</sup> The doctrine of separability has been justified on the following grounds - that it conforms with the intention of parties, that it protects the integrity of the arbitral process and that there is a legal presumption that two different agreements exist, amongst others. The doctrine has proven to be useful where a recalcitrant party initiates court proceedings in breach of an arbitration agreement. See Janet A Rosen, 'Arbitration Under Private International Law: The Doctrine of Separability and Competence de la Competence' (1993-1994) 17 *Fordham International Law Journal* 599, 607; See also Jack Tsea-Ta Lee, 'Separability, Competence-Competence and the Arbitrators Jurisdiction in Singapore' (1995) 7 *Singapore Academy of Law Journal* 421, 422; Ayten Maitafayeva, 'Doctrine of Separability in International Commercial Arbitration' (2015) 1 *Baku State University Law Review* 93, 98.

<sup>148</sup> A distinction should be made between invalid contracts and contracts which are allegedly non-existent. A contract is invalid ab-initio when for example it violates public policy or if it is characterised by fraudulent execution or flawed formation. On the other hand, a contract is non-existent when for example there has not been a meeting of the minds or when one of the parties to the dispute was not party to the contract. See A. Gardner (n 135) 305.

<sup>149</sup> Domenico Di Pietro, 'The Influence of the New Law on Arbitration Agreements and Arbitrato Irrituale' (2007) 10(1) *International Arbitration Law Review* 18, 19; Philipa Charles, 'The Proper Law of the Arbitration Agreement' (2014) 80(1) *Arbitration* 55, 56.

submission is still in question.<sup>150</sup> In other words, although a submission agreement is allowed, it does not have a binding effect as parties can still withdraw their submission at any time before an award is finally delivered by the tribunal. This practice is very similar to the former customary arbitration principle as defined in *Agu v Ikewibe*.<sup>151</sup> We critically dealt with arguments arising from this position in Chapter Five.

In our proposed framework, we adopt a wider definition of submission agreements by borrowing a leaf from the customary arbitration practice in Nigeria: a submission agreement will also include a situation where the claimant without any prior arbitration agreement with the other party, submits a dispute to either an arbitrator of his choice or the National Arbitration Centre.<sup>152</sup> This practice will clearly be useful in smaller disputes and/or disputes involving friends, business partners and members of a restricted industry. Unlike the situation in a country like Saudi Arabia, where parties to a submission agreement require the approval of the courts before their agreement can be enforced as valid,<sup>153</sup> parties under our framework are able to enter into a valid arbitration on their own accord, since the Saudi Arabia approach clearly erodes parties' autonomy to decide the method of resolving their disputes.<sup>154</sup>

An agreement will only be said to have been established when the other party accepts and/or both parties unconditionally agree to submit to the jurisdiction of a particular arbitrator.<sup>155</sup> In other words, under this special arrangement, the respondent can either accept the claimants' suggestion to arbitrate as well as the latter's nomination of arbitrator (unconditional acceptance), accept the claimants' suggestion to arbitrate but reject the nominated arbitrator (conditional acceptance) or reject the idea of arbitration in its entirety. Where the acceptance is conditional, both parties will be expected to

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<sup>150</sup> Tra T. Pham and Marie Hudson, 'Arbitration Agreements Between Arab and European Trade Parties' (1990) 1 International Business Law Journal 63, 64.

<sup>151</sup> (1991) 3 NWLR PT 180.

<sup>152</sup> We discuss this further in this chapter.

<sup>153</sup> See Article 6 of the Saudi Arbitration Law 2012.

<sup>154</sup> This provision is similar to the aforementioned Section 2 of the Nigerian Arbitration and Conciliation Act, which enables the court revoke a validly made arbitration agreement.

<sup>155</sup> We clearly disagree with the position in Ghana as provided in Section 7 of the Ghanaian ADR Act 2010, which allows the court to refer any dispute to arbitration on its own volition. This writer questions the voluntariness of the consent purportedly obtained from the parties under such circumstances.



agree on the mutually acceptable arbitrator(s). It is only if and when parties agree on their arbitrator(s) that an unconditional agreement to arbitrate will be said to exist. Rather than reject the claimants' nomination, the respondent may also appoint his own arbitrator, subsequent upon which both arbitrators will meet and appoint a third arbitrator. In such a situation, an agreement is reached when both parties successfully appoint their arbitrator(s) and not when the third arbitrator is appointed.<sup>156</sup>

## 2.3 The Dispute

### 2.3.1 *A Strictly Domestic Arbitration Framework*

The proposed framework is limited in scope to domestic arbitration. This is as against the existing Nigerian Arbitration and Conciliation Act, which combines both domestic and international arbitration in one framework. We submitted in Section 1.2 of this chapter that the present situation which puts domestic and international arbitration in one framework, inhibits the growth and practice of domestic arbitration in Nigeria. As we posited in Chapter Four, while the existing Nigerian Arbitration Act is arguably suitable for the country's international arbitration practice because it is closely modelled after the UNCITRAL Model Law, the same cannot be said about domestic arbitration for reasons which we previously highlighted.<sup>157</sup> Nigeria arguably has a fast developing international arbitration practice, especially when compared with her domestic arbitration practice which seems to be stagnant.<sup>158</sup>

Moreover, the evidence on ground clearly suggests that there is a bias for international arbitration in Nigeria.<sup>159</sup> For example, in the current Nigerian Arbitration and

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<sup>156</sup> See Section 1.0 of Chapter Five.

<sup>157</sup> See Section 1.1 of Chapter Four.

<sup>158</sup> In recognition of the developing market and arbitration opportunities in Nigeria and Africa, the International Chamber of Commerce organised her first African Regional Arbitration Conference in Lagos, Nigeria between 19 -21 of June 2016. From experience, this writer has also witnessed the growing international arbitration caseload emanating from Nigeria. The writer was a Trainee Counsel at the Common Law department of the International Chamber of Commerce (ICC), Paris, worked at the arbitration department of the London offices of the international law firm, Hogan Lovells LLP as well as practised as a Barrister at a top tier dispute resolution law firm in Nigeria prior to his PhD. At the ICC and Hogan Lovells LLP, this writer was involved in a number of international arbitrations involving Nigerian companies. As a Barrister in Nigeria, while the firm was involved in a number of international arbitrations involving Nigerian clients, it had no existing domestic arbitration at the time.

<sup>159</sup> The bias is not only seen in Nigeria as it seems to be spread across all jurisdictions. For example, we saw in Section 2.0 of Chapter Five that while there are a lot of material (including laws) specifically defining and discussing international arbitration, there is little or no discussion on domestic arbitration.

Conciliation Act, while *Section 4 of the Act* mandates the court to stay any litigation proceeding in favour of a validly made international arbitration agreement, *Section 5 of the same Act* gives courts the discretion to decide whether or not to stay such a domestic arbitration agreement. In addition, while parties to an international arbitration are given the discretion to decide the rules of procedure applicable to their arbitration, the Act again limits parties to a domestic arbitration, to the Nigerian Arbitration Rules.<sup>160</sup> Again, it should be recalled that while there have been attempts in the past to reform the arbitration and ADR laws in Nigeria, those attempts, despite the best efforts of the Nigerian government, have unjustifiably been diverted to the development of international arbitration alone. For example, in Chapter Four, we saw that rather than focus on its mandate, the National Committee on the Reform and Harmonisation of Arbitration and ADR Laws in Nigeria seemed to be fixated on the idea of international arbitration.<sup>161</sup>

Furthermore, domestic and international arbitrations, especially in a developing country like Nigeria, have completely different requirements. For example, while it may be within acceptable limits to advocate for a flexible agreement and award for the domestic arbitration practice in Nigeria, it will clearly not be acceptable to extend this argument to an international arbitration agreement with its seat in Nigeria, in view of the provisions of the New York Convention, which requires a written arbitration agreement for enforcement purposes.<sup>162</sup> Rather than merge two very different practices in one framework, it is more efficient to separate them and focus on each of these practices, especially in a developing country where both systems have varying requirements.

This writer strongly believes that to successfully encourage the development of arbitration in Nigeria, efforts should first be made to develop a thriving domestic arbitration practice before moving on to international arbitration practice. It is futile to attempt to build an international arbitration practice in Nigeria when the country does not even have a successful domestic practice. This is one reason why this writer

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<sup>160</sup> Nigerian Arbitration and Conciliation Act, section 15.

<sup>161</sup> See Section 4.0 of Chapter Four.

<sup>162</sup> See Article II and IV of the New York Convention 1958.

believes that the recently established Lagos Court of Arbitration (LCA), which focuses on international arbitration, is over ambitious, ill-conceived and not in the best interest of the State.<sup>163</sup> It is farfetched to assume that international investors and business men will ignore tested institutions like the International Chamber of Commerce (ICC), London Court of International Arbitration (LCIA) and the Singapore International Arbitration Centre (SIAC) and instead opt for the services of a new arbitration institution with little or no experience of arbitration, as well as a country with a budding commercial arbitration practice, without real and tested proof of capacity.

Unfortunately, as Collins Namachanja rightly noted, rather than focus on the development of local talents as well as concentrate on building the domestic arbitration practices on ground, the trend and general practice in many African countries seems to be to import international and developed practices into a still developing continent.<sup>164</sup> Little wonder many of the African institutions have handled far fewer cases than their counterparts in other jurisdictions.<sup>165</sup>

The right approach should have been to focus on building a successful domestic arbitration practice. The experience garnered from building the domestic arbitration practice would have proven to be very useful in the development of an international arbitration version and will also convince investors of the capacity of the LCA as well as confirm the general and friendly disposition of the Nigerian courts to arbitration. An arbitration law and word of mouth alone are not enough to build an international arbitration practice. Charity they say begins at home. Admittedly, this argument

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<sup>163</sup> The Lagos Court of Arbitration was established in 2009 by the Lagos Court of Arbitration Law. For more details about the court, see the official website of the Lagos Court of Arbitration <<http://lca.org.ng/about/>> accessed 31 May 2016.

<sup>164</sup> Collins Namachanja, 'The challenges facing arbitral institutions in Africa' (2016) 82(1) *Arbitration* 44, 48.

<sup>165</sup> See Steven Finizio and Thomas Fuhrich, 'Expert View: Surveying Africa; Africa's Advance' (2014) *Commercial Dispute Resolution* (May/June 2014) <[www.wilmerhale.com/uploadedFiles/Shared\\_Content/Editorial/Publications/Documents/expert-view-surveying-africa-africas-advance-finizio-2014.pdf](http://www.wilmerhale.com/uploadedFiles/Shared_Content/Editorial/Publications/Documents/expert-view-surveying-africa-africas-advance-finizio-2014.pdf)> accessed 5 February 2016.

about the gap between both domestic and international arbitration may not apply to developed jurisdictions like the United Kingdom.<sup>166</sup>

### 2.3.2 *Redefining Domestic Arbitration*

Flowing from the above, we adopt a wider definition of domestic arbitration, which will include customary arbitration.<sup>167</sup> We have seen in Chapter Five and Chapter Six that customary arbitration not only has a deeply rooted history in Nigeria and Ghana respectively, but more importantly that it remains a legally recognised method of resolving domestic disputes in Nigeria.<sup>168</sup> Particularly, we discover that in terms of practice and procedure, customary arbitration is in many ways very similar to the traditional idea of domestic arbitration.<sup>169</sup> For example, under our discussion of customary arbitration, we saw that a validly made customary arbitration agreement is also binding, that parties have the autonomy to nominate their own arbitrators as well as the date, time and process by which their disputes will be administered, that a customary arbitration award is final and will serve as estoppel on the issues decided as between the parties to the arbitration, amongst many other similarities.<sup>170</sup>

While in Chapter Six we lauded Ghana for taking the bold step of enacting a customary arbitration framework, we also submitted that enacting a separate customary arbitration framework is unnecessary,<sup>171</sup> especially since many jurisdictions like Nigeria<sup>172</sup> and the United Kingdom<sup>173</sup> have been able to find a balance which incorporates the arguably different domestic and international arbitration framework in one.<sup>174</sup> Like Ghana therefore, we recommend a statutory arbitration framework that recognises and incorporates customary arbitration.

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<sup>166</sup> Our definition of development extends to the level of education, infrastructural development as well as the cosmopolitan nature of the United Kingdom.

<sup>167</sup> We have seen in Chapter Five that the idea of domestic arbitration varies from jurisdiction to jurisdiction. We are therefore suggesting a domestic arbitration framework, which suits our purpose.

<sup>168</sup> *Agu v Ikewibe* (1991) 3 NWLR PT 180.

<sup>169</sup> *Agala v Okusin* (2010) 10 NWLR (Pt 1202) 412.

<sup>170</sup> See Section 2.1 and 2.2 of Chapter Five of this thesis.

<sup>171</sup> See Part Three of the Ghanaian ADR Act 2010.

<sup>172</sup> The Nigerian Arbitration and Conciliation Act 2004.

<sup>173</sup> The English Arbitration Act 1996.

<sup>174</sup> See Section 1.1.2 of Chapter Six.

However unlike Ghana, which provides different sections or parts within its Act for arbitration (in the sense in which it is popularly known) and customary arbitration,<sup>175</sup> we suggest a common domestic arbitration framework that incorporates both domestic arbitration and customary arbitration into one common part, especially since both arbitration practices have similar provisions. To the extent that they differ however, we adopt the practice in jurisdictions with a common domestic and international framework, by highlighting and specifically providing for any irreconcilable differences between domestic and customary arbitration. This approach will enable the Act to cater for a wider range of domestic disputes, which are presently beyond the purview of the existing Nigerian Arbitration Act, thus providing a real alternative to litigation.

### 2.3.3 Arbitrability

The concept of arbitrability varies from one jurisdiction to another.<sup>176</sup> As we have seen in previous chapters, there are predominantly two reasons why certain subject matters are not arbitrable. First is the fact that parties to an arbitration agreement may intend that certain disputes arising in connection with their head contract should not be subject to arbitration. The second and more important reason is where the law of the forum prohibits certain disputes from being arbitrated.<sup>177</sup>

This second category is arguably a limitation to party's autonomy to decide the method of resolving their dispute.<sup>178</sup> The idea behind this position is many times not farfetched. The Federal Court of Australia held in *Comandale Marine Corp v Pan Australia Shipping Pty Ltd* that the idea behind the concept of arbitrability is that there

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<sup>175</sup> Arbitration in its traditional sense is provided for in Part One of the Ghanaian ADR Act 2010 while customary arbitration is provided for in Part Three of the same Act.

<sup>176</sup> Alfred Oseko Nyanchoka, 'The Scope of Arbitrability Under Kenyan Law' (2013) 79(3) Arbitration 273.

<sup>177</sup> For a detailed discussion on the concept of arbitrability especially as it relates to international arbitration, see Ilias Bantekas, 'The Foundations of Arbitrability in International Commercial Arbitration' (2008) 27 Australian Year Book of Internal Law' 193; See also Kartikey Mahajan, 'The Arbitrability of Fraud in India' (2005) 81(1) Arbitration 48, 50.

<sup>178</sup> Francois Dessemontet, 'Party Autonomy and the Law Applicable to the Arbitrability of IP Rights and Licensing Transactions' (2013) 5 International Business Law Journal 421, 422.

are sufficient elements of legitimate public interest in the said subject matter, which make it very inappropriate to use a private dispute resolution system.<sup>179</sup>

According to Francis Kellor, the *lex fori* should ordinarily have very little influence over the procedure and outcome of the arbitration, since the role of the law of the forum is merely to supplement and fill any gaps in parties' agreement as well as provide a framework capable of regulating the conduct of arbitration.<sup>180</sup> Notwithstanding, we strongly agree with Jan Paulsson in his opinion of the need to balance the domestic importance of limiting certain matters of public interest to the courts as against reserving parties' right to decide the mechanism and process of resolving their disputes.<sup>181</sup>

Further to this (and contrary to the existing Nigerian Act), we advocate for a wider scope while still defining the scope of the proposed framework.<sup>182</sup> In other words, this model framework adopts a wider definition of arbitrability.<sup>183</sup> This is as against the existing position under the Act, which limits its scope to commercial disputes.<sup>184</sup> Like Ghana, which as we have seen in Chapter Six suffers the same overburdened case list that Nigeria is presently suffering from,<sup>185</sup> we extend the scope of the PDAA to accommodate even non-commercial disputes.<sup>186</sup> As mentioned in Chapter Four, the present position in Nigeria presupposes that the usefulness of arbitration is limited to

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<sup>179</sup> (2006) FCAFC 192, 200.

<sup>180</sup> Frances Kellor, *Arbitration in Action: A Code For Civil, Commercial and Industrial Arbitrations* (New York, Hapier 1941) 35.

<sup>181</sup> Jan Paulsson, *The Idea of Arbitration* (Oxford University Press 2013) 45.

<sup>182</sup> It should be recalled that in Chapter Six, we argued that the seemingly wide scope of the Ghanaian ADR Act makes it susceptible to manipulation and controversy. There is therefore a need to strike a balance between the over restrictive approach of the existing Nigerian Act and the liberal but arguably controversial approach of the Ghanaian framework. See Section 1.1.2 of Chapter Six.

<sup>183</sup> Redfern and Hunter on International Arbitration note that many countries have adopted a wide approach to the concept of arbitrability. See Nigel Blackaby et al (n 5)124; See also Antoine Kirry, 'Arbitrability: Current Trends in Europe' (1996) 12 Arb International 373, 375.

<sup>184</sup> The Preamble to the Nigerian Arbitration and Conciliation Act.

<sup>185</sup> Kwadwo Sarkodie, 'Arbitration in Ghana-The Alternative Dispute Resolution Act 2010' 1 <[www.mayerbrown.com/files/Publication/5ee12231-1295-4559-8167-89d93cdf2a06/Presentation/PublicationAttachment/91e048fe-67d4-4e3f-9d10-8bbf9861e753/ArbitrationGhana\\_Sarkodie.pdf](http://www.mayerbrown.com/files/Publication/5ee12231-1295-4559-8167-89d93cdf2a06/Presentation/PublicationAttachment/91e048fe-67d4-4e3f-9d10-8bbf9861e753/ArbitrationGhana_Sarkodie.pdf)> 1 accessed 28 January 2015.

<sup>186</sup> See Section 1 of the Ghanaian ADR Act 2010.

commercial issues, which is not true. For example, there is a rise in the practice of family arbitration in the United Kingdom.<sup>187</sup>

Very interestingly, most of the commonly used superior courts in Nigeria are courts of general jurisdiction. In other words, apart from issues relating to labour, customary and sharia law, all other subject matters including criminal law issues are resolved by the same courts at various levels.<sup>188</sup> For arbitration to provide a real alternative to litigation therefore, it must not only be able to avoid the pitfalls of the litigation practice in Nigeria, it must also be able to cater for almost the same categories of disputes as the litigation practice. By extending the scope of the PDAA beyond commercial disputes, the framework is able to cater for more categories of disputes, thereby providing a real and viable alternative to litigation. Furthermore, the courts in States like Oyo, Ondo and Ekiti, among others, which primarily have land disputes, will have some relief from existing pressure.

Notwithstanding our desire to provide a viable alternative to litigation, certain matters which are within the jurisdiction of the courts are clearly placed beyond the scope of the PDAA for different reasons. For example, issues relating to criminal law, and policy are for obvious reasons placed beyond the purview of arbitration.<sup>189</sup> Taking a cue from the English court's decision in *Deutsche Schachtbau v National Oil*,<sup>190</sup> disputes involving public policy will be those with elements of illegality as well as disputes in which the enforcement of the award would clearly be injurious and/or wholly offensive to a reasonable member of the public. Any question or controversy arising from this public policy exemption will be resolved by the DAC.

Even though election disputes also make up a bulk of cases at the Nigerian courts, we make them inarbitrable. Like issues relating to crime and public policy, issues relating to government, democracy and the rights of the people to choose their leaders, are issues which should not involve a private or compromise process. Like crime, these

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<sup>187</sup> See Nigel Shepherd (n 26) 65

<sup>188</sup> See Section 2.0 of Chapter Two for a discussion on the jurisdiction of Superior Courts in Nigeria.

<sup>189</sup> As we argued in Section 1.1.2 of Chapter Six, such issues include environmental law and so unlike the Ghanaian Act, we do not create a separate head for environmental law issues here.

<sup>190</sup> (1987) 3 WLR 38.

are issues which directly affect the public and do more than interfere with the private rights of citizens.<sup>191</sup> This should as a matter of necessity involve the active participation of the State for many reasons, one of which relates to the issue of enforcement. As we mentioned in Chapter Two, in a country like Nigeria where parties who rig elections are sworn in pending the decision of the court on any petition, it many times requires the involvement of State apparatuses like the police (and at times even the Nigerian armed forces) to enforce a decision of the court to remove a sitting government official. A private arbitrator obviously does not and should not have such powers to command security agencies to enforce an arbitration award.

## **2.4 Starting an arbitration: the appointment of an arbitral tribunal.**

### **2.4.1 Issues Relating to Party Autonomy**

In Chapter Four, we argued that *Section 15 of the Nigerian Arbitration and Conciliation Act*, which mandates and limits parties in a domestic arbitration proceeding to the use of the Nigerian Arbitration Rules, is not only discriminatory,<sup>192</sup> it also violates parties' rights and autonomy to decide the process by which their dispute may be resolved.<sup>193</sup> Greater degrees of flexibility as well as party autonomy are one of the biggest advantages of arbitration, especially as against the litigation method.<sup>194</sup>

Further to the point made above, we recommend that parties in an ad hoc arbitration be allowed to decide the rules by which their arbitration will be administered. In regards to institutional arbitration,<sup>195</sup> parties may initiate their arbitration by filing their notice of arbitration at the NAC, which as a matter of default will be resolved via the rules of the NAC.<sup>196</sup> However, unlike institutions like the ICC and the LCIA but

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<sup>191</sup> David Ormerod, QC and Karl Laird, *Smith and Hogan Criminal Law* (14<sup>th</sup> Edition, Oxford University Press 2015) 5.

<sup>192</sup> This is discriminatory because parties to an international arbitration are not subjected to that same limitation. Section 53 of the Nigerian Arbitration and Conciliation Act allows parties choose the Procedural Rules that will administer their arbitration. As we have seen at various points, this is just one of the many discriminatory provisions in the Nigerian Arbitration and Conciliation Act.

<sup>193</sup> This is definitely not a very common practice; see Section 5(2) of the Ghanaian ADR Act 2010.

<sup>194</sup> Christopher Lau and Christi Horlack, 'Party Autonomy-The Turning Point' (2010) 4 *Dispute Resolution International* 121.

<sup>195</sup> By institutional arbitration, we are referring to arbitration provided via structures provided by NAC.

<sup>196</sup> This is the position at foremost institutions like the ICC Court of Arbitration and the London Court of International Arbitration.



like the CCJA<sup>197</sup> and even the Alternative Dispute Resolution Centre in Ghana,<sup>198</sup> the NAC will be able to provide support for disputes under other established arbitration Rules. This position has been taken mainly because of the intended purpose of the NAC, which is to assist the government in providing an efficient and viable alternative mechanism to litigation. This implies that unlike the ICC and the LCIA but like CCJA, the NAC will be less of a business and profit making organization. Parties may therefore use the NAC solely as an appointing authority, while conducting their arbitration ad hoc or under any other agreed procedural Rule.

In addition, as against the very problematic position in Nigeria,<sup>199</sup> we adopt the Ghanaian practice, which allows parties to be represented by any person of their choice, thus avoiding the problems associated with the existing Nigerian provision.<sup>200</sup> The implication of this provision is that parties are no longer under compulsion to appoint a Nigerian lawyer (or any lawyer at all) to represent their interests. This new provision supports the party autonomy doctrine underlying the arbitration practice.

Besides, widening the pool from which parties can choose their representation may in fact have the effect of reducing the time spent on arbitration, since parties will be free to appoint non lawyers who have expertise knowledge on the issues in dispute to represent their interest. Professor Akanbi rightly submits that lawyers have stripped the arbitration practice of its acclaimed flexibility as they tend to prosecute or defend arbitration proceedings like court actions.<sup>201</sup> Furthermore, litigation lawyers are well known for their delay tactics and frivolous applications, which they sometimes use to frustrate the process<sup>202</sup> or simply to get ahead of their opponent in proceedings.<sup>203</sup> To

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<sup>197</sup> See Article 10 of the Uniform Act on Arbitration 1999.

<sup>198</sup> Ghanaian ADR Act 2010, section 5(2) (3).

<sup>199</sup> In Section 2.1 of Chapter Four, we argued that the combined implication of Article 4 of the Arbitration Rules, Section 18 of the Interpretation Act and Sections 24 and 2 of the Legal Practitioners Act is that only Nigerian qualified lawyers can represent parties in an arbitration.

<sup>200</sup> Ghanaian ADR Act 2010, section 42.

<sup>201</sup> Mustapha Akanbi, 'Challenging of arbitration proceedings under the Nigerian Arbitration and Conciliation Act of 1988: Some Practical Considerations' (2012) 78(4) Arbitration 325, 329.

<sup>202</sup> Alain Freion, 'Delaying Tactics in Arbitration' (2004) 59(4) Dispute Resolution Journal 46.

<sup>203</sup> Emilia Onyema, 'Selection of Arbitrators in International Commercial Arbitration' 9 <[http://eprints.soas.ac.uk/4424/1/selection\\_of\\_arbitrators.pdf](http://eprints.soas.ac.uk/4424/1/selection_of_arbitrators.pdf)> accessed 25 January 2016.

some others, it is simply another opportunity to demonstrate their legal prowess.<sup>204</sup> As Collins Namachanja noted, these have the effect of increasing costs,<sup>205</sup> especially in situations in which the arbitrator is paid per hour. Widening the pool from which parties can seek representation, will help to reduce to the barest minimum, the influx of litigation practices in arbitration, reduce delay as well as ensure competition. These will arguably have implications on the cost of arbitration.

#### **2.4.2 *Oral Notice of Arbitration and the Filing Process***

We also advocate for the incorporation of oral notices of arbitration into the Nigerian arbitration framework. In other words, parties will be able to commence their arbitration via an oral notice, which the NAC may subsequently reduce to writing. This provision will be directly related to the aforementioned provision on oral agreements; only arbitrations that are allowed to be evidenced orally can be commenced via an oral notice. In other words, only disputes below ten million naira can be validly instituted via oral notice.

Notwithstanding the aforementioned point, parties to an oral arbitration agreement need not commence their dispute resolution process via an oral notice if they so choose or agree not to. Oral notice will however prove to be useful in the resolution of simple disputes, which need not be complicated by a writing requirement and unnecessary form. We also believe that to the extent that we redefine domestic arbitration to include customary arbitration, oral notices will encourage the growth and use of arbitration in the less developed areas of Nigeria as well as among the uneducated but wealthy business men in Nigeria.

One thing which we will also introduce into the domestic arbitration practice is the option of electronic filing. Interestingly, as we have noted in a previous chapter, developing jurisdictions like Ghana have incorporated this practice into their arbitration framework. Unfortunately, not even the court system in Nigeria has

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<sup>204</sup> K.I. Laibuta, 'ADR in Africa: Contending with Multiple Legal Orders for Wholesome Dispute Resolution' (2016) 82(1) *Arbitration*, 63, 65.

<sup>205</sup> Collins Namachanja (n 164) 48.

adopted the electronic filing system.<sup>206</sup> Introducing the electronic filing system will not only aid an efficient dispute resolution process, it will also aid a cheaper, faster and more environmentally friendly process since the process will involve the use of less paper.<sup>207</sup> Nonetheless, we will retain the paper filing system for parties who are not conversant with the internet and technology.

As we mentioned under our discussions on the NAC, the organization will establish a wide physical presence around the country. Like the Federal High Court of Nigeria for example, parties will be able to file their paper notices of arbitration as well as conduct their arbitration at any of the branches of the NAC closest to them. This will encourage a speedy, cost effective and very efficient arbitration system. Any disagreement as to where the proceedings should be held will be resolved by the tribunal having regard to issues like cost, location of the subject matters and the parties.

We also adopt the frontloading system practised in many jurisdictions including the civil procedure in many States in Nigeria.<sup>208</sup> Under the civil procedure rules of many courts in Nigeria, parties are mandated to frontload their Statements of Claim and Defence, Witness Statements on Oath, Affidavits, Written Addresses among other court documents.<sup>209</sup> This framework will take advantage of the flexibility and speed available through the frontloading of arbitration documents. Parties will therefore be expected to frontload arbitration documents. At this point, parties may elect to have the tribunal decide their dispute based on their documentary submissions alone.<sup>210</sup>

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<sup>206</sup> Nigerian courts still operate analogue-based systems except in few States like Lagos. For example, Judges still take long hand notes.

<sup>207</sup> Environmental activists have in recent times raised alarm about the need to take better care of the environment in order to arrest the acceleration of environmental decline and ensure sustainable development.

<sup>208</sup> Front loading is the process of filing litigation documents at the court registry ahead of trial in a bid to give the court and the other party prior knowledge of documents intended to be relied on, in the course of proceedings. In a bid to reduce the length of trial, the Civil Procedure Rules in many States in Nigeria have incorporated this procedure into their Rules.

<sup>209</sup> See for example, Order 3 of the Rules of Civil Procedure of Lagos State 2012.

<sup>210</sup> Section 29B (3(A) of the recent Indian Arbitration Ordinance 2015 introduces a similar fast track process wherein parties may decide that their dispute be decided on the basis of their written pleadings, documents and submissions. Under the fast track process, the tribunal will be expected to deliver an award six months after the appointment of the arbitrator(s). See Section 29(B) (4) of the Indian Arbitration Ordinance 2015.

Professor Ilias Bantekas rightly suggests that the significance of an actual oral hearing is in fact exaggerated, especially when one takes into consideration the savings that can be made via a documentary process.<sup>211</sup> Parties will save a lot on solicitors' fees as well as on accommodation, transportation and logistics cost.<sup>212</sup>

As against the aforementioned documentary approach, parties may on the other hand choose to also have oral hearings and arguments based on the frontloaded documents. Even under this second approach, we strongly believe that the frontloading system will not only aid a quick and fast process,<sup>213</sup> it will also reduce the actual time needed and expended on oral presentations, since most of parties' arguments will already be clearly stated in the frontloaded documents. Oral presentations will therefore only be needed and useful in order to clear areas of ambiguity and/or confusion.

#### **2.4.3. The Arbitration Tribunal**

It is generally agreed that the success of an arbitration many times depends on the arbitration tribunal, so parties are very careful when selecting their panel.<sup>214</sup> Unfortunately, the arbitrators' fees and incidental expenses have to a large extent contributed to the high cost of arbitration.<sup>215</sup> It is therefore not out of place to submit that a one-person tribunal will definitely be cheaper than a three person tribunal.<sup>216</sup> Besides, because a one-person tribunal will involve less deliberation as compared to a

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<sup>211</sup> Ilias Bantekas (n 97) 161.

<sup>212</sup> Nobert Horn also argues that problems which the e- arbitration process may actually face are not necessarily different from those which many be found in the regular arbitration process. See Nobert Horn, 'Arbitration and Electronic Communication: Public Policy' (2009) 12(5) *International Arbitration Law Review* 107,114.

<sup>213</sup>For example, the witness Statement on Oath eliminates the time allocated for a formal Examination-in-Chief.

<sup>214</sup> William Park, 'Arbitrators and Accuracy' (2010) 1 *Journal of International Dispute Settlement* 25; Derains and Levy (eds), *Is Arbitration Only as Good as the Arbitrators Status, Power and Roles of the Arbitrator?* (ICC Institute of World Business Law 2011). For a general discussion on some of the factors that should be taken into consideration when appointing arbitrators, see Pierre Lalive, 'Requirements of International Arbitration: The Selection of Arbitrators' in Reymond and Bucher (eds), *Swiss Essays on International Arbitration* (Schulthess 1984) 23; Lauren Timmer, 'The Quality, Independence and Impartiality of the Arbitrator in International Commercial Arbitration' (2012) 78 *Arbitration* 348.

<sup>215</sup>Nigel Blackaby et al (n 5) 36.

<sup>216</sup> Tom Arnold, 'Delay and Cost Booby Traps in Arbitration Practice and How to Avoid Them' (1995) 4 *Currents International Trade Law Journal* 43,45.

three-person tribunal, parties save more time and by extension money when they opt for a one-person tribunal.<sup>217</sup>

As we mentioned in Chapter Six, it is therefore ironic that Nigeria and Ghana,<sup>218</sup> which still have high levels of poverty, prescribe a three-person tribunal,<sup>219</sup> while the United Kingdom, where standard of living is generally higher, adopts the relatively cheaper option of a one-person tribunal.<sup>220</sup>

Of course, we admit that there is need to balance the high cost associated with arbitration, with the need to achieve a just and fair process.<sup>221</sup> Further to this consideration, we adopt the position under the UAA of the OHADA, which prescribes an alternate one or three person arbitral tribunal system.<sup>222</sup> However, unlike the UAA which does not qualify or state when either of the former systems should be used thus giving room for confusion, we recommend that as a matter of default, any dispute below ten million naira should be administered via the one arbitrator system. On the other hand, we suggest that any dispute beyond ten million naira will be subject to a default three-person arbitral system.<sup>223</sup> We are working on the premise that disputes of a certain worth will involve more risk and that parties in such disputes will prefer and have the capacity to fund a three person tribunal, especially since a three-person tribunal should ideally deliver a more reasoned award, mainly because of the debates,

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<sup>217</sup> Doug Jones, 'Techniques in Managing the Process of Arbitration' (2012) 78(2) *Arbitration* 140,143; See also Nigel Blackaby et al (n 5) 237.

<sup>218</sup> See Section 6(1) of the Nigerian Arbitration and Conciliation Act 2004 and Section 13 (2) of the Ghanaian Alternative Dispute Resolution Act 2010.

<sup>219</sup> According to statistics recently released by the Vice President of Nigeria, over one hundred million Nigerians live below the poverty line. See Levinus Nwabughogu, 'Over 100m Nigerians living below poverty line' *The Vanguard* (20 August 2015) <[www.vanguardngr.com/2015/08/over-1-million-nigerians-living-below-poverty-line-osinbajo/](http://www.vanguardngr.com/2015/08/over-1-million-nigerians-living-below-poverty-line-osinbajo/)> accessed 20 November 2015.

<sup>220</sup> English Arbitration Act 1996, section 15 (3).

<sup>221</sup> It should be recalled that we had clearly argued against a two-person tribunal in Section 3.2 of Chapter Six of this thesis.

<sup>222</sup> Uniform Act on Arbitration 1999, article 8.

<sup>223</sup> This comes to about twenty-four thousand pounds (£24000). As we previously argued, taking into consideration the present minimum wage in Nigeria, which is about forty-four pounds (£44) as well as the present standard of living in Nigeria, we believe that this is a useful default threshold. Majority of the disputes which will reach this threshold will often involve corporate bodies as well as a level of technicality, which parties may prefer to be resolved by a three-person tribunal. Again it is reiterated that this is suggested as a default provision.

interactions and cross-fertilization of ideas that must have occurred among the arbitrators.<sup>224</sup>

Flowing from the above, the default number of arbitrators will either be one or three, depending on the value of the dispute. Parties will of course be allowed to review these default number of arbitrators, subject to the fact that even numbered tribunals will not be allowed, in order to eliminate the possibility of inconclusive awards, thus defeating the decision to arbitrate and ultimately resulting to litigation.<sup>225</sup> Further to this possibility, the English Act discourages even numbered tribunals,<sup>226</sup> while some other jurisdictions like Ghana<sup>227</sup> expressly prohibit even numbered tribunals.<sup>228</sup> The latter is definitely the recommended approach.<sup>229</sup>

In Chapters Three and Six, we argued that the direct involvement of parties in the appointment of arbitrators affects the sanctity of the arbitral process.<sup>230</sup> It is not unreasonable to assert that parties will seek to appoint arbitrators who will be sympathetic to their respective submissions, a position which may not necessarily be the just or right approach.<sup>231</sup> As Mark Alcolt rightly noted, there have been a number of situations where it has been alleged that arbitrators have acted the script of their designators.<sup>232</sup> Onyema adds that in practice, party appointed arbitrators usually consult their appointing parties before appointing a chairman of the panel.<sup>233</sup> Van den

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<sup>224</sup> Tom Arnold (n 216) 45.

<sup>225</sup> Thomas E Carbonneau, *Towards a New Federal Law on Arbitration* (Oxford Publishers 2014) 176

<sup>226</sup> Section 15(2) of the English Arbitration Act provides that “unless otherwise agreed by the parties, an agreement that the number of arbitrators shall be two or any other even number shall be understood as requiring the appointment of an additional arbitrator as Chairman of the tribunal. See also Section 3,2 of Chapter Six for a discussion on this issue.

<sup>227</sup> Ghanaian ADR Act 2010, section 13(1).

<sup>228</sup> Other jurisdictions that have adopted this approach include France, Netherlands, Belgium, Italy and Portugal among others.

<sup>229</sup> See Section 1.1.2 of Chapter Six for more discussion on this issue.

<sup>230</sup> See Section 5.2 of Chapter Three and Section 4.2 of Chapter Six.

<sup>231</sup> See Doak Bishop and Lucy reed, ‘Practical Considerations for Interviewing, Selecting and Challenging Party Appointed Arbitrators in International Commercial Arbitration’ (1998) 14(4) *Arbitration International* 395; Tom Arnold (n 215); M. Scott Donahey, ‘The Independence and Neutrality of Arbitrators’ (1992) 9(4) *Journal of International Arbitration* 31, 34; Martin Hunter, ‘Ethics of the International Arbitration’ (1987) 53 *Arbitration* 219, 223.

<sup>232</sup> Mark H. Alcolt, ‘It Aint Over Even When it’s Over: Post- Award Attacks on Arbitration’ (2013) 7 *Dispute Resolution International* 5, 6.

<sup>233</sup> Emilia Onyema (n 203) 7.

Berg also notes that most of the time, dissenting opinions in an award are delivered by the arbitrator appointed by the party that lost the case in whole or in part.<sup>234</sup>

In response to this, Redfern and Hunter on International Arbitration<sup>235</sup> noted that notwithstanding the possibility that a party nominated arbitrator may actually be inclined to support his/her appointing party, this should ordinarily not prevent such an individual from doing the right thing.<sup>236</sup> Our reaction to this is that it is in fact easier said than done.<sup>237</sup> It is difficult for this writer to accept a proposition that is based on personal integrity and mind-set. While there are no doubt many upright people around, there are also many people of poor moral standing. James Madison, in the Federalist Papers No 10 rightly noted that that “as long as the reason of man continues fallible...and he is at liberty to exercise it, different opinions will be formed...”.<sup>238</sup> As it is often said, even the devil does not know the intentions of man. It is difficult to separate the wheat from the chaff hence the preference for a safer approach especially in a country like Nigeria is necessary.

Furthermore, as Jan Paulson rightly noted, “the fact that dissenting arbitrators are nearly always those who have been appointed by the party aggrieved by the majority decision does not in and of itself point to a failure of ethics. It may simply be that the appointing party has made an accurate reading of how its nominee is likely to view certain propositions of law or circumstances of fact. The problem is that the

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<sup>234</sup> Van den Berg, ‘Dissenting Opinions by Party Appointed Arbitrators in Investment Arbitration’ in Arsanjani, Karz Cogan, Sloane and Wiessner (eds), *Looking to the Future: Essays in Honour of W’ Michael Reisman* (Koninklijke Brill 2010) 821 -843; See also Alan Redfern, ‘Dissenting Opinions in International Commercial Arbitration: The Good, the Bad and the Ugly’ (2004) 20 *Arbitration International* 22.

<sup>235</sup> Nigel Blackaby et al (n 5) 25

<sup>236</sup> See also Brower and Rosenberg, ‘The Death of the Two Headed Nightingale: Why the Paulsson-Van den Berg Presumption that Party-Appointed Arbitrators are untrustworthy is Wrong’ (2013) 29 *Arbitration International* 7.

<sup>237</sup> Interestingly, Professor Hunter in a previous article admitted that he is particular about picking arbitrators who are favourably inclined to his position. This position is not in itself a bad one, instead it is a realistic one. See Martin Hunter, ‘Ethics of the International Arbitration’ (1987) 53 *Arbitration* 219, 223

<sup>238</sup> The Federalist Papers were essays written by James Madison, Alexander Hamilton and John Jay in the Mid 1780s. The papers can be viewed at [www.foundingfathers.info/federalistpapers/](http://www.foundingfathers.info/federalistpapers/) accessed 10 January 2016

inevitability of such calculations prove that unilateral appointments are inconsistent with the fundamental premise of arbitration: mutual confidence in arbitrators”.<sup>239</sup>

In order to avoid this problem, as a default provision we adopt the approach in Ghana<sup>240</sup> by introducing into the Nigerian arbitration framework the position of an appointing authority. Parties will be able to agree on their appointing authority. Where parties fail to agree on an appointing authority, the NAC will act as the appointing authority. In exercising this power, the appointing authority will be expected to take into consideration the nature of the dispute as well as the agreement and/or any requirements stipulated by the parties.

In addition, where parties have more than one arbitrator, we also introduce into the Nigerian arbitration practice the position of a chairman who will also serve as the head of the tribunal. The process of appointing the chairman will vary, depending on the appointment process adopted. In a three-person tribunal constituted by the NAC, the arbitrators appointed will be expected to appoint a chairman from among themselves. However, where parties opt to appoint their arbitrators, we adopt the practice in many jurisdictions, where each party appoints his arbitrator and the two arbitrators appoint the third, who will also act as chairman. The appointment of the chairman via this second method will neutralise whatever permutations may have been made by either side to influence the proceeding via their arbitrators. Besides, as Doug Jones rightly noted, in a three-person tribunal where two arbitrators have been appointed by the parties, the award is arguably the view of the chairman.<sup>241</sup>

Furthermore, we incorporate the practice in Ghana<sup>242</sup> and under institutional rules like the ICC Rules,<sup>243</sup> which makes it mandatory for potential arbitrators to provide details about their present diary and general workload as well as any information that may give rise to any question as to conflict of interest and/or bias.<sup>244</sup> As Professor Park rightly opined “...someone who meets the bill with respect to experience and

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<sup>239</sup> Jan Paulsson (n 58).

<sup>240</sup> See Ghanaian ADR Act 2010, section 26.

<sup>241</sup> Doug Jones (n 217) 143.

<sup>242</sup> Ghanaian Arbitration 2010 Act, section 15.

<sup>243</sup> ICC Arbitration Rules 2012, article 11(2).

<sup>244</sup> See Section 1.1.2 of Chapter Six.



qualifications may have commitments that interfere with early hearings”.<sup>245</sup> Redfern and Hunter on International Arbitration also noted that, ascertaining a prospective arbitrator’s availability (by asking concrete, rather than general questions about competing commitments) before making an appointment may be as important in ensuring an efficient and effective process as establishing his or her experience.<sup>246</sup> We therefore submit that any doubt as to whether or not disclosure of certain facts are (or would be) relevant should be resolved in favour of more disclosure.<sup>247</sup>

In light of this, we reject the practice under the UAA, which seems to give arbitrators the discretion to decide whether or not to disclose any information. For example, in *Scandinavian Reinsurance Company v. St Paul Fire and Marine Insurance Co*,<sup>248</sup> the courts in the United States vacated an arbitration award because two arbitrators had failed to disclose their involvement in a pre-existing but similar arbitration. The successful party not only argued that the arbitrators had a duty to disclose their involvement in the first proceeding but also that their involvement in the first proceeding influenced their decision in the subsequent arbitration proceeding. In order to reduce these unnecessary and very avoidable controversies, there is need to encourage as much disclosure as possible on the part of the arbitrators.<sup>249</sup>

This provision is important in order to reduce the likelihood of delays arising from the appointment of a busy arbitrator. Besides, as at the time of appointment, the information at the disposal of the arbitrator is not usually enough to make a potential or actual decision as to personal conflict. Only the parties have all the information and so should be the ones to decide issues relating to conflict. By mandating the arbitrators to give a general indication of their existing workload therefore, parties are able to speculate and avoid the possibility of bias or conflicts, which arbitrators at the point of appointment, may or may not be aware of. Any dispute relating to the appointment

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<sup>245</sup> William Park, ‘Arbitration in Autumn’ (2011) 1 International Dispute Settlement Journal 287

<sup>246</sup> Nigel Blackaby et al (n 5) 249.

<sup>247</sup> Article 3 of the IBA Guidelines on Conflict of Interest in International Arbitration 2014 provides a useful guideline on this issue.

<sup>248</sup> (732 F Supp 2d 293 (SDNY 2010), REVD, 668 F 3d 60 (2d Cir 2012).

<sup>249</sup> Mark H. Alcolt (n 232) 5.

of the arbitrators will be resolved by the appointing authority and in the absence of one, the DAC.<sup>250</sup>

We adopt a recent practice of new generation arbitration institutions like the Singapore International Arbitration Centre (SIAC)<sup>251</sup> and countries like Ghana,<sup>252</sup> where the institution compiles and maintains a list of reputable arbitrators with varied trainings, experiences and with diverse nationalities. This provides parties with proven and ready options to choose from. The existence of this list will also serve as a form of recognition for persons who have distinguished themselves within the sphere of arbitration and will by extension encourage personal development among arbitrators (and potential arbitrators). While the Board of Directors of the NAC will have the discretion to invite persons who in their opinion have distinguished themselves within the sphere of arbitration to join the list, qualified members of the public will also be allowed to apply to the NAC to be included on this list.

As a default and basic provision, it is proposed that members of this list have at least a law degree. This is mainly because one cannot discount the relevance and application of the law in the resolution of disputes via arbitration. Furthermore, as a default provision, potential arbitrators must have five and ten years post qualification experience, for disputes valued below or at ten million and above ten million respectively. Notwithstanding the foregoing, in view of the fundamental party autonomy principle, parties may choose to nominate non-lawyers or lawyers who do not meet the prescribed qualification to serve as their arbitrator(s).

Admittedly, parties especially in commercial transactions sometimes prefer arbitration because it offers them a practical solution as against a strictly legal solution. It has also been argued that parties to an arbitration agreement are constructors of their dispute resolution mechanism and so they can be presumed to know who and

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<sup>250</sup> This is one of the situations (alluded to under our discussion on the DAC) where it is necessary to have an independent third party decide.

<sup>251</sup> Website of the Singapore International Arbitration Centre <[www.siac.org.sg/our-arbitrators](http://www.siac.org.sg/our-arbitrators)> accessed 20 November 2015.

<sup>252</sup> Ghanaian ADR Act 2010, section 14(7).

what would be most suitable to resolve their dispute.<sup>253</sup> Rather than concentrate on the real issues in dispute, lawyers acting as arbitrators are said to be easily distracted by issues relating to the technical rules of evidence and procedure, thus making the process unnecessarily complicated.<sup>254</sup> Therefore, some have argued that business executives and professionals are more suited to administer commercial arbitrations.<sup>255</sup> By virtue of their experiences, the aforementioned are said to possess the right managerial and administrative skills as well as the technical knowledge to properly resolve commercial disputes.<sup>256</sup> They are said to be able to approach both legal and practical problems without “the baggage of national legal culture”.<sup>257</sup>

While there is value in the aforementioned arguments, we believe that a slight exception should be made in this proposed framework, primarily because its application will extend beyond commercial and sophisticated transactions. It is intended to apply to both literate and illiterate parties in commercial and non-commercial, sophisticated and simple, as well as large and small disputes. As we saw in Chapter Five, a substantial number of people in Nigeria remain uneducated and largely unaware of their legal rights and entitlements.

Law and the judicial system in general provide a useful and reasonable standard on what is right and fair.<sup>258</sup> Parties must be aware of these rights and also capable of understanding the implication(s) of opting out of the security provided by the law. A good and acceptable analogy can be made with the restriction on parties’ capacity to enter into a lawful contract as well as opt out of their right of access to the court. In such circumstances, the law seeks to protect the weak or vulnerable from exploitation.

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<sup>253</sup> Toby Landau, ‘Composition and Establishment of the Tribunal’ (1998) 9 Am. Rev. Int. Arb 45; Emilia Onyema (n 203) 1.

<sup>254</sup> Michael J. Ahschuler, ‘Arbitrating Before a Non Attorney Construction Industry Neutral’ (2009) Dispute Resolution Journal 15.

<sup>255</sup> James E. Meason and Alison G. Smith, ‘Non Lawyers in International Commercial Arbitration: Gathering Splinters on the Bench’ (1991) 12 (1) North-Western Journal of International Law and Business 25, 44-45.

<sup>256</sup> *ibid.*

<sup>257</sup> Eur Lng Geoffrey M. Beresford Hartwell, ‘Arbitration Procedures: Achieving Efficiency Without Sacrificing Due Process’ (A Paper presented at a session of the Working Group II at the 14<sup>th</sup> ICCA Congress on 5<sup>th</sup> May, 1998 in Paris, France) <[www.nadr.co.uk/articles/published/arbitration/ExpertiseRelevance.pdf](http://www.nadr.co.uk/articles/published/arbitration/ExpertiseRelevance.pdf)> accessed 25 January 2016

<sup>258</sup> Admittedly, this assertion may not apply in all instances.

Similarly in this instance, we believe that the State has a duty to protect the weak and ignorant from an exploitative counterpart. There are some basic principles of law put in place to protect the weaker party as well as ensure the fair and just resolution of disputes. A good example is the *audi alterem partem* principle. It is important that neutrals especially in disputes which possibly may involve a weaker party, are aware of and apply these principles.<sup>259</sup> Redfern and Hunter on International Arbitration rightly noted that “even where the dispute is relatively simple, difficult problems of procedure and of conflict of law can regularly arise. These are problems that a lawyer with suitable procedural and legal experience is generally better equipped to handle than a person whose expertise lies in another area”.<sup>260</sup> In order to create a balance between the need for a practical solution on one hand and a legal solution on the other, parties may decide to appoint in house (non-practising) lawyers.

Notwithstanding the foregoing argument, we reiterate that parties may choose to nominate non-lawyers or lawyers who do not meet the prescribed qualification to serve as their arbitrator(s). This opt in/opt out provision allows parties who prefer practical solutions as against the hybrid or strictly legal solutions, to opt out of the said protection or standard provided for by the law.

Our proposed framework will also encourage not only practising lawyers, but also members of the academia who teach or research in specialised areas of the law, in-house lawyers working in specialised industries and very importantly, traditional chiefs,<sup>261</sup> to act as arbitrators. Arbitrators will be allowed to have a scale of fees, which along with a brief resume, will be maintained by the NAC and will be available for parties to view and choose from. This will not only encourage arbitrators to constantly and continuously expand their knowledge and experience, it arguably will have the effect of breaking monopoly and by implication also reduce the cost of domestic

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<sup>259</sup> Besides, it has become the practice in many industries to have legal departments, with in house (non-practising) lawyers reviewing the so-called technical documents. This particular set of business executives by virtue of their legal training arguably have the basic knowledge of the aforementioned principles so they strike a balance between the rigidity associated with a strict application of the law and the need to ensure the application of the basic principles of fairness as encapsulated in law.

<sup>260</sup> Nigel Blackaby et al (n 5) 246

<sup>261</sup> Notwithstanding the strategic role which traditional rulers play, especially as custodians of customary beliefs and practices, they have no duties under the law. See Chapter 1.0 of Chapter Two.

arbitration in Nigeria.<sup>262</sup> The NAC will be mandated to ensure a periodic training exercise for members on the list. This is because in the performance of his duties, an arbitrator not only has to exercise a series of management skills, he usually has to evaluate evidence.<sup>263</sup> These are skills which require constant training.<sup>264</sup> In addition, an arbitrator needs to be kept apprised of any changes that have been made to the relevant substantive and procedural law.

In line with our desire to reduce the cost of arbitration to the barest minimum, one recent practice which we do not incorporate is the emergency arbitrator provision.<sup>265</sup> *Article 29(1) of the ICC Arbitration Rules* for example provides that “a party that needs urgent interim or conservatory measures that cannot await the constitution of an arbitral tribunal (emergency measures) may make an application for such measures”.<sup>266</sup> As can be deduced from above, the emergency provision provides an option to parties to deal with very urgent matters arising from their contract prior to the constitution of the tribunal.<sup>267</sup> While the emergency arbitrator’s provision provides a useful and very efficient option for parties,<sup>268</sup> it is submitted that it is more practical in international arbitration proceedings and/or contentious disputes with very high

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<sup>262</sup> It would break monopoly because parties will have the opportunity to compare the experiences and fee range of potential arbitrators.

<sup>263</sup> Derek Sharp, ‘Applying management principles to arbitration’ (1996) 62(1) *Arbitration* 1, 3.

<sup>264</sup> There is the general belief that arbitrators lack these requisite skills. See Collins Namachanja, ‘The challenges facing arbitral institutions in Africa’ (2016) 82(1) *Arbitration* 44, 52.

<sup>265</sup> Brock and Feldman, ‘Recent Trends in the Conduct of Arbitrations’ (2013) 30 *Journal of International Arbitration* 177, 198; Nigel Blackaby et al (n 5) 235.

<sup>266</sup> International Chamber of Commerce Arbitration Rules 2012; See also Section 9B of the LCIA Rules 2014; Article 43 of the Swiss Rules 2012, Schedule 4 of the Hong Kong International Arbitration Centre Rules 2013.

<sup>267</sup> For a more detailed discussion on the history and development of the emergency arbitrator provision, see Jason Fry, ‘The Emergency Arbitrator – Flawed Fashion or Sensible Solution?’ (2013) 7 *Dispute Resolution International* 179.

<sup>268</sup> For example, it provides a quick and speedy method of overcoming the difficulty of granting interim measures arising before the appointment of the tribunal, especially for parties who seek to avoid the machinery of the court. Even though courts also provide a useful alternative, at the initial stage of very complicated international disputes, it is sometimes very difficult to identify the applicable law and court; an emergency arbitrator may also be useful in such an instance. For more discussions on these issues, see Thomas E Carbonneau (n 225) 187; Sir Vivian Ramsey, ‘National Courts and Arbitration: Collaboration or Competition? The Courts as Competitors of Arbitration’ (2015) 81(4) *Arbitration* 446, 449; Edgardo Munoz, ‘How Urgent Shall an Emergency Be - The Standards Required to Grant Urgent Relief by Emergency Arbitrators’ (2015) 4 *Yearbook on International Arbitration* 43, 46; Baruck Baigel, ‘The Emergency Arbitrator Procedure under the 2012 ICC Rules: A Juridical Analysis’ (2014) 31(1) *Journal of International Arbitration* 1.

sums at stake. Spending extra and very large sums of money on emergency arbitrators where much lower sums are in dispute or at stake is not practical. The DAC being a special but Superior Court of Record provides a cheaper, faster and more practical option to the emergency arbitrator provision in domestic arbitration.<sup>269</sup> Under the suggested procedure, parties do not have to expend extra funds on arbitration fees. Furthermore, parties do not have to go through the process of vetting and appointing a suitable arbitrator twice. Instead, parties can simply approach the DAC and obtain a quick and fast order of the court with far less stress than via an emergency arbitrator.<sup>270</sup>

## **2.5 The Arbitral Proceedings**

### **2.5.1 *The Role of ADR***

The arbitrators, but more especially the NAC, will have the duty to ensure that parties explore every avenue to resolve their dispute in a more amicable and less contentious manner before opting for the more contentious arbitration process. Parties will therefore be expected to explore less contentious methods of resolving disputes, like mediation and negotiation, before opting for the more contentious arbitration.<sup>271</sup> This is in line with the civil procedure practice in many States in Nigeria (and many other jurisdictions), which require parties and their counsel to explore ADR before opting for litigation.<sup>272</sup> As part of their originating papers, parties will be expected to sign a statement averring that they have made all attempts to resolve their dispute with no success.<sup>273</sup> This will apply to every arbitration undertaken via the NAC. Notwithstanding any difficulties associated with this, it is submitted that a successful ADR has the potential to save parties substantial cost and time.

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<sup>269</sup> We discuss this issue in more detail in Section 2.0 of Chapter Six.

<sup>270</sup> We briefly discuss this issue in Section 3.2 of Chapter Six.

<sup>271</sup> See the ICC Arbitration and Mediation Rules for guidance.

<sup>272</sup> In Section 3.0 of Chapter Three, we considered the fact that arbitration is almost as contentious as litigation.

<sup>273</sup> Many ADR provisions in other jurisdictions involve a combination of all the ADRs. This kind of clauses are known as multi-step or escalation clauses; See Renate Dendorfor and Jeremy Lacke, 'The interaction between Arbitration and Mediation: illusion or reality' (2007) 1 *Dispute Resolution International* 73; Ilias Bantekas (n 97) 9-10.

While we encourage hybrid processes like the Med-Arb, we discourage the same individual from participating in both mechanisms, for ethical reasons. We argued in Chapter Three that it is difficult to agree that an arbitrator who listened to parties bare the weaknesses of their respective cases during mediation, will be fair enough to decide the dispute based on the facts presented by each of the parties in the arbitration and without recourse (consciously or unconsciously) to information garnered during the mediation.<sup>274</sup> In addition, we also advocate against the practice in Ghana, which allows the courts to refer to arbitration, a matter which in its opinion is best suited for this practice, since like we highlighted in Chapter Six, the question as to the existence of consent is debatable.

### 2.5.2 Case Management Conference

Before any real work is done on the arbitration, we adopt the practice in jurisdictions like Ghana,<sup>275</sup> as well as the practice under the rules of the ICC<sup>276</sup> by advocating for the introduction of Case Management Conferences, Terms of Reference and the Procedural Timetable, with the goal of encouraging a speedy and cost effective process in the long run. In order to save cost, and taking a cue from the practice in Ghana, we suggest that this conference be held either in person or via electronic media.<sup>277</sup> As Nuel Bunni rightly noted, case management conferences allow parties to identify and deal with knotty issues right from the beginning,<sup>278</sup> and so the arbitrators are able to focus on the substance of the dispute, thus saving a lot of time and cost within an already contentious process.<sup>279</sup> We admit that case management conferences

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<sup>274</sup> This is the position in Ghana and it definitely does not encourage a fair process. See Sections 30 and 47 of the Ghanaian ADR Act 2010.

<sup>275</sup> Ghanaian ADR Act 2010, section 29.

<sup>276</sup> ICC Arbitration Rules, article 24. The ICC had introduced the Case Management Conference on the recommendation of the ICC's Task Force on Reducing Time and Cost in Arbitration. See ICC, 'Techniques For Controlling Time and Costs in Arbitration: Report From the ICC Commission on Arbitration' (ICC Publication 843 2007) [www.iccwbo.org/uploadedfiles/Timelost\\_E.pdf](http://www.iccwbo.org/uploadedfiles/Timelost_E.pdf) accessed 19 February 2016.

<sup>277</sup> Commentators have opined that cutting the arbitration time in half will no doubt reduce arbitration cost: Tom Arnold (n 216) 44.

<sup>278</sup> Nuel G. Bunni, 'Construction Disputes on the Eve of the New Millennium' (1999) 65 (4) Arbitration 308, 312.

<sup>279</sup> Tom Arnold (n 216) 44.

may not be worth it in smaller disputes and so parties are able to opt out of this provision if they so desire.

### **2.5.3 *Applicable Language and Law***

Parties will be expected to agree on the language in which their proceedings will be conducted. Where parties fail to agree on a language, the applicable language will be determined by the tribunal. This is because while English language remains the official language in Nigeria, and may very well be a common denominator between parties, other considerations may exist which may make another language more suitable in domestic proceedings. For example, we have in a previous chapter submitted that Nigeria is made up of 500 different tribes and cultures. Furthermore, as we have emphasised, the level of education in Nigeria is still rather on the low side. The Nigerian law also recognizes oral contracts, many of which are conducted in local dialects. For these reasons, we submit that rather than foist a particular language on parties, the issue of language especially in regards to domestic arbitration proceedings should be decided on a case by case basis.

In view of the fact that this is suggested as a domestic arbitration framework, a lot of the previous discussion on choice of law are not relevant here. One must add that for the purposes of customary law, this should ordinarily not be a problem as it can be assumed that only parties sharing similar customary and cultural roots will ordinarily opt for customary arbitration. However, in the very rare situation in which parties have failed or are unable to agree on an applicable customary law, we do not prescribe any default law. Instead we stipulate that the applicable law will be as determined by the tribunal, after taking into consideration factors like the State of origin and/or residence of parties as well as the nature of the dispute, amongst others.<sup>280</sup>

### **2.5.4 *Duration, Time limit and Extension of Time Provisions***

We adopt the practice in OHADA's UAA by prescribing a six months duration within which the arbitration process should ordinarily be concluded.<sup>281</sup> Tom Arnold rightly

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<sup>280</sup> See for example the ICC Arbitration Rules, Article 21(2); Singapore International Arbitration Rules, Article 27

<sup>281</sup> Uniform Act on Arbitration 1999, article 12.



submits that proceedings may actually progress faster if parties are working towards a deadline.<sup>282</sup> This provision in conjunction with the aforementioned Case Management Conference, Procedural Time Table, and Terms of Reference, will help to ensure that proceedings are conducted in an efficient fashion and that disputes are determined in a timely manner, thus reducing the likelihood of delays and backlogs.<sup>283</sup>

The effects of a timely dispute resolution process, especially in a jurisdiction like Nigeria, extend beyond issues of justice and fairness. Ironically, while cost is said to be one of the biggest banes of arbitration, it is submitted that a timely arbitration system in a country like Nigeria may in fact be cheaper than a decade long litigation process. When one examines the amount of resources spent on legal fees, transportation costs and filing fees among others, over a period of ten years and still with no end in sight, we realise that it may in fact be cheaper and definitely more efficient, to opt for a speedier and more effective dispute resolution process rather than one which on the face of it looks cheap but on a closer look and in the long run, is in fact more expensive. Perhaps in the end, the cooperation and availability of all the parties in the proceedings, is the single greatest factor affecting the cost of arbitration.<sup>284</sup>

While in a previous paragraph we advocated for a procedural timetable to ensure certainty as well as aid an efficient process, we concede that there are unforeseen and unplanned situations where it may be necessary to extend the time within which parties are expected to act. We incorporate the extension of time procedures found in many civil litigation frameworks and which has also crept into the practice of arbitration. For example, under the English Arbitration Act, parties who are not able to initiate proceedings within the agreed period are allowed to apply to the court for an order of the court extending the time to commence their proceedings.<sup>285</sup>

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<sup>282</sup> Tom Arnold (n 216) 43.

<sup>283</sup> The recently introduced Indian Arbitration Ordinance 2015, which came into effect in January 2016, also introduces a twelve-month duration, renewable for a further six months. Any subsequent renewal will be subject to the courts' discretion. See Article 29 of the new Indian Arbitration ordinance. See also Delphine Constantina, 'India's Amended Arbitration Law: What's New For Foreign Investors' (2016) 1 International Business Law Journal 41.

<sup>284</sup> James P. Wiesel, 'Cost Effective Construction Arbitration' (2011) 31 Construction Lawyer 15, 20.

<sup>285</sup> English Arbitration Act 1996, section 12(1)(a).

In our framework however, we make a distinction between extension of time applications made before the commencement of the arbitration<sup>286</sup> and those required in the course of the proceeding.<sup>287</sup> For an extension of time application made before the commencement of the proceeding, parties will be able to make an application to the DAC, seeking an order extending the time within which they are to act.

On the other hand, an application for extension of time arising during the course of the proceeding must be made to the tribunal. In both situations, an order extending time would only be granted where the court or the tribunal is satisfied that the circumstances leading to the lapse of time were outside the reasonable contemplation of the parties when they agreed on the provision relating to time. The court may also extend time if in its opinion, it will be just to extend same or that the conduct of one party makes it unjust to hold the other party to the strict terms of the provision.<sup>288</sup>

#### ***2.5.5. Consolidation and Third Party Proceeding***

Finally on the subject of proceedings, we allow parties to consolidate two or more proceedings with similar subject matter.<sup>289</sup> As we mentioned in Chapter Six,<sup>290</sup> this is one of the advantages which the litigation practice has over arbitration.<sup>291</sup> In response and as we have previously seen, frameworks in jurisdictions like the United Kingdom have incorporated the practice into their arbitration practice.<sup>292</sup> The Supreme Court of Nigeria has rightly opined that a consolidation order is essentially for the convenience of the parties as it saves them the time and cost expended on litigation, in cases

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<sup>286</sup> This will mostly be applicable where the agreement or the law requires that notices be filed within a particular period.

<sup>287</sup> This on the other hand will be applicable where the agreement, the procedural time table or the law prescribes a time frame within which parties are expected to perform certain actions in the course of the proceedings.

<sup>288</sup> See Section 12(3) of the English Arbitration Act 1996.

<sup>289</sup> This provision is influenced by Section 35 of the English Arbitration Act 1996.

<sup>290</sup> See Section 4.2 of Chapter Six.

<sup>291</sup> Interestingly, by consolidating proceedings, parties may in fact save a lot on cost as all the parties involved in the different proceedings could then pool their resources together towards one central proceeding.

<sup>292</sup> See also Articles 7 and 8 of the ICC Arbitration Rules 2012, Article 15 of the Vienna International Arbitration Rules 2013; the Swiss Rules of International Arbitration 2012.

involving common questions.<sup>293</sup> It also avoids the possibility of conflicting decisions on the same issue.<sup>294</sup>

Like the ICC's Court of Arbitration, the NAC will be empowered to entertain and supervise the process of consolidating similar proceedings. Furthermore, third parties to the arbitration agreement and proceedings will be allowed to be a part of the arbitration proceedings, by making an application to the NAC.<sup>295</sup> The NAC will of course need to obtain the written consent of the existing parties before joining third parties to an existing proceeding. Any disagreement or controversy arising from this consolidation process will be dealt with by the DAC.

In granting an order of consolidation, the decision of the Supreme Court of Nigeria in *Naboth Okwuagbala & ors v Margaret Ikwueme & ors*<sup>296</sup> on an application to consolidate similar court proceedings is instructive. In this case, the court held that an order of consolidation will only be granted if the judge is satisfied that the issues in the suit can be resolved in one joint proceeding rather than in separate proceedings. In arriving at this decision, the court held that the Judge must be satisfied that; 1) some common questions of law or fact arise in both or all the causes or matters; 2) the rights to reliefs are claimed in respect of or arise out of the same transaction or series of transaction; or 3) that for some other reason, it is desirable to make an order of consolidation.

It is important to emphasize that because an agreement is integral to the validity of an arbitration, all parties to the proceedings must agree to the consolidation process.<sup>297</sup> This is as against the position in a jurisdiction like Hong Kong, where the court is allowed to order the consolidation of arbitrations with common questions of law or

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<sup>293</sup> *Iloabuchi v Edigbo* (2000) 4 SCNJ 46.

<sup>294</sup> Nigel Blackaby et al (n 5) 141.

<sup>295</sup> Our earlier discussion on the ability of third parties to join the arbitration is relevant here. See Section 2.1.2 of this chapter.

<sup>296</sup> (2010) 12 SC (Pt IV) 1.

<sup>297</sup> This was also the opinion of the DAC on the issue of whether the court or the tribunal should be able to coerce parties to consolidate their proceedings. The committee was of the opinion that it would amount to a negation of the principle of party autonomy to give the tribunal or the court, the power to order consolidation of concurrent hearings. See Departmental Advisory Committee on Arbitration Law, Report on the Arbitration Bill (February 1996) para 180.

fact, where the dispute arises from the same transaction or series of transaction as well as in situations where the court deems it necessary to consolidate proceedings.<sup>298</sup> In other words, unlike litigation and in a jurisdiction like Hong Kong where the court is able to coerce parties to consolidate proceedings, parties must consent to the consolidation process. Fremuth-Wold and Schuck have pointed out that consent may be express or implied. For example, it may be implied when all the parties in a particular dispute or transaction appoint the same arbitrator(s).<sup>299</sup>

## **2.6 The Tribunal's Final Decision and its Enforcement**

Upon the conclusion of the arbitration, the tribunal will be expected to deliver a final decision, after which it becomes *functus officio*. The general rule has and will remain that where parties opt for arbitration, they cannot, when the award is unfavourable, object to the decision either upon issues of law or fact.<sup>300</sup> At this point, any issue that has been decided upon by the tribunal operates as *res judicata* and cannot be revisited either by an arbitration tribunal or the court.<sup>301</sup>

Unlike the position under the Model Law, which also gives the tribunal the power to interpret the award, we adopt the argument that this power to interpret its award inadvertently gives the tribunal the ability to revisit its award.<sup>302</sup> Instead of this approach of the Model Law therefore, we adopt the English approach, which arguably only allows the tribunal to correct clerical or typographical errors. Any question as to the interpretation of the award should be addressed to the DAC.

This framework will require the tribunal to, as a matter of default, deliver a written award, a copy of which should be submitted to the NAC. This is important in order to avoid present and future controversy as to the exact decision of the tribunal. The NAC will be expected to keep a record of the decision. While not a compulsory aspect of the arbitration process, we retain the existing position, which allows parties to

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<sup>298</sup> Hong Kong Arbitration, Schedule 2, Section 2. Note however that this is an opt-in provision.

<sup>299</sup> Alice Fremuth-Wolf and Yoanna Schuck, 'The New Arbitration Rule of the Vienna International Arbitral Centre of Vienna (Vienna Rules 2013)' (2013) 16(6) *International Arbitration Law Review* 198, 202.

<sup>300</sup> See the decision of the Supreme Court of Nigeria in *Taylor Woodrow of Nigeria Limited v Suddeutsche Etna-Werk GmbH* (1993) 4 SCNJ 32.

<sup>301</sup> *Raz Pal Gazi v FCDA* (2001) 7 SCM 195.

<sup>302</sup> See Section 4.2 of Chapter Six.

apply to the court (the DAC in this instance) to obtain a recognition and enforcement order of the award, thus aiding its enforcement like any other judgement of a superior court, peradventure the award debtor fails to abide by the award.

As against the position of the Nigeria law, which states that the time limitation for the enforcement of an award begins to run from the day the cause of action arose and not from the date the implied promise to abide by the award is breached,<sup>303</sup> we adopt the position in England as embodied in the *Agromet Motoimport Ltd v Maulden Engineering Co (Beds) Ltd*.<sup>304</sup> In other words, where an action has to be brought to enforce an arbitration award, for the purpose of limitation, the cause of action accrues on the date when the other party fails to honour the award.<sup>305</sup>

Even though an appeal on the substance of the arbitration award will technically not be allowed, parties will be able to challenge the award on the basis of jurisdiction. We make a distinction between a challenge on the basis of the tribunals' lack of jurisdiction on one hand and the challenge of the award on the basis that it goes beyond the jurisdiction of the arbitration agreement on the other hand. While the former affects the validity of the whole award, the latter only touches on the validity of the aspect of the award that goes beyond the jurisdiction of the arbitrator. *Article 34(2) of the Model Law 2006* provides useful guidance to the tribunal on how to answer questions relating to jurisdiction. For example, *Article 34(2) (a) (I) of the aforementioned Law* allows the tribunal to set aside an award where one of the parties to the agreement was under some form of incapacity as at the time of entering into the agreement. Such a situation obviously concerns the jurisdiction of the arbitration.<sup>306</sup>

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<sup>303</sup> For a discussion on this, see Section 3.6 of Chapter Four. See also the case of *City Engineering Nigeria Ltd v. Federal Housing Authority* (1997-1998) All NLR 1.

<sup>304</sup> (1985) 1 W.L.R 762.

<sup>305</sup> See Section 3.6 of Chapter Four for an analysis of this issue.

<sup>306</sup> See Article 34 (2) of the Revised Model Law 2006 for a list of factors which a tribunal under this framework may take into consideration.

The Nigerian Act,<sup>307</sup> Ghanaian Act,<sup>308</sup> Uniform Act on Arbitration,<sup>309</sup> Model Law<sup>310</sup> and even the English Arbitration Act<sup>311</sup> all allow the tribunal to rule on any question relating to its jurisdiction. This seems to be the generally accepted approach, which has come to take root in arbitration practice.<sup>312</sup> However unlike the approach in Nigeria, Ghana, the Model Law and the OHADA region, parties have a further right to appeal the decision of the tribunal in England.<sup>313</sup>

In our proposed framework, we recommend the approach in England, which enables the tribunal to entertain any jurisdictional challenge occurring in the course of the proceedings, subject to a right of appeal to the DAC. This is because while we are reluctant to tamper with the established competence doctrine, we believe that this doctrine should be balanced with the fair hearing principle – “*nemo iudex in causa sua*”.<sup>314</sup> It is submitted that because of the monetary compensation which arbitrator(s) have to benefit if the matter goes on, the tribunal arguably has a cause in the jurisdiction objection, and so any decision of the tribunal on this matter should be subject to some form of oversight function.<sup>315</sup>

Furthermore, Nigeria like many other nations of the world is unfortunately plagued by corruption.<sup>316</sup> In Chapter Two, we saw that this plague has infiltrated the Nigerian judiciary, an arm of government which ordinarily should only be made up of persons of the highest integrity. Allowing checks and balances on the powers of the arbitrator will to a large extent prevent arbitrary or corrupt tendencies. The DAC being a special

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<sup>307</sup> Nigerian Arbitration and Conciliation Act, section 12.

<sup>308</sup> Ghanaian ADR Act 2010, section 24.

<sup>309</sup> Uniform Act on Arbitration 1999, article 11.

<sup>310</sup> Revised Model Law 2006, article 16(1).

<sup>311</sup> English Arbitration Act 1996, section 30(1).

<sup>312</sup> The Competence doctrine empowers the tribunal to rule over issues relating to its jurisdiction. For a detailed discussion of the doctrine, see Francisco Gonzalez De Cossio, ‘The Compétence-Compétence Principle, Revisited’ (2007) 24(3) *Journal of International Arbitration* 231; Janet Rossen, ‘Arbitration under Private International Law: The Doctrine of Separability and Competence de la Compétence’ (1994) 17(3) *Fordham International Law Journal* 599.

<sup>313</sup> English Arbitration Act 1996, section 30(2).

<sup>314</sup> This Latin principle when translated to English means that you cannot be a judge in your own cause.

<sup>315</sup> See Section 4.2 of Chapter Six.

<sup>316</sup> In 2014, Nigeria was ranked the third most corrupt country in West Africa and the one hundred and thirty sixth (136<sup>th</sup>) in the world by Transparency International <[www.transparency.org/country/](http://www.transparency.org/country/)> accessed 20 November 2015.

arbitration court, is in the best position to perform this function.<sup>317</sup> Parties will be expected to raise whatever objections they have to the arbitrators' jurisdiction as soon as it comes to their notice, failing which it will be assumed that they have acquiesced to the situation or by conduct agreed to either extend the arbitrators' jurisdiction or extend the scope of their arbitration agreement.

The other part of the jurisdictional challenge will be when the award goes beyond the scope of the arbitration agreement. In such a situation, the DAC will be the proper forum for this kind of challenge. The Supreme Court of Nigeria opined in *Nigerian National Petroleum Corporation v Lutin Investment Ltd & Anor*<sup>318</sup> that the tribunal has the jurisdiction to decide only what has been submitted by the parties for determination. Further to this decision and depending on the circumstances of the case, the court may decide to cut out all parts of the arbitration award that are beyond or inconsistent with the arbitration agreement and/or the law.<sup>319</sup> For example, in a country like Nigeria with many municipal laws, in a situation in which parties expressly oust the application of a particular law, any part of the award that is based on an inapplicable law would be held to be invalid. A notice of appeal must be filed within one month of the decision in question failing which this right of appeal elapses.

Other acceptable challenges will be when a party alleges that the arbitration was conducted improperly or that there has been failure to comply with certain aspects of the arbitration agreement. This provision will provide a form of check on the powers of the arbitrator. This is important especially in a country where impunity and corruption seems to be the order of the day even within the judiciary.<sup>320</sup> It is important that the State ensures that the seemingly wide powers of the tribunal is checked and that parties are protected from unscrupulous arbitrators.

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<sup>317</sup> It is submitted that the position of a Judge is different from that of an Arbitrator. The difference lies in the fact that a Judge ordinarily does not have any direct or indirect, pecuniary or otherwise interest in the continued existence or outcome of the case.

<sup>318</sup> (2006) 1 SCNJ 131.

<sup>319</sup> Issues that are inconsistent with the law would include issues stated in statute to be beyond the scope of arbitration.

<sup>320</sup> We discussed this point extensively in Section 3.4 of Chapter Two.

## CONCLUDING REMARKS

In this chapter, we have come up with a bespoke domestic arbitration framework for Nigeria. While in some instances, we retained the existing practice and case law in Nigeria, in many others, we drew on the experiences of other countries like Ghana, England and the OHADA region. We also made some recommendations independent of these frameworks, which we believe will promote domestic arbitration in Nigeria.

In many instances, we advocated for a total repeal of existing statutory provisions. For example, we advocated against *Section 2 of the Nigerian Arbitration Act*, which allows courts revoke parties' arbitration agreement without their consent. In other words, we withdrew the powers of the Nigerian court to revoke a valid and reproach free arbitration agreement. Similarly, we withdrew the discretionary and unlimited right of the Nigerian courts to decide whether or not to stay litigation proceedings even in the face of a validly made domestic arbitration agreement.

In some other situations, we advocated for more flexible provisions and procedures, in line with the level of development in Nigeria. For instance, we submitted that unlike the existing Act as well as the provisions of the Ghanaian, the UAA and even the English Arbitration Act, the literacy level in Nigeria does not support a strictly written and signed arbitration agreement. We therefore incorporated the more flexible option as provided in Option two of Article 7 of the Revised Model Law, which also allows oral arbitration agreements. Admittedly, writing is still the most reliable method of evidencing parties' agreement, so caution must be applied. We therefore limited the scope of oral agreements to disputes of a particular value.

In some other instances, we introduced new structures in order to aid the development of the domestic arbitration practice in Nigeria. For instance, we advocated for the establishment of a Nigerian Arbitration Centre. Unlike its Ghanaian equivalent and in order to reduce cost, a perceived disadvantage of arbitration, we advocated for the financial involvement of the government in the administration of the Centre. Furthermore, in order to make the activities of the NAC more relevant and appropriate for her proposed end users, we made representatives of these end user organisations members of the Board of Directors. Unlike the situation in Ghana,



we advocated for a more transparent appointment process to the Board in order to prevent nepotism and favouritism. We also advocated for a special arbitration court to cater for arbitration disputes in Nigeria, both domestic and international. Not only will this special court reduce erroneous or anti arbitration decisions by the regular court, it will also prove to be useful and practical in resolving arbitration disputes as well as provide State support for the arbitration process in general. For example, parties in simple pre-arbitration disputes need not expend huge sums to appoint an emergency arbitrator. Furthermore, an award creditor also has the support of the State in case the award debtor fails to voluntarily abide by the award.

We also borrowed a leaf from the customary arbitration practice in Nigeria. For example, under our proposed framework, a submission agreement will include a situation where the claimant without any prior agreement with the other party to the dispute, submits a dispute to either an arbitrator of his choice or the NAC. A submission agreement will be said to exist if the other party accepts or in the case of a variation, both parties agree to the variation made by the respondent.

Finally, in some situations, we recommended a new process independent of all the frameworks under consideration. For instance, we made a case against the existing unified international and domestic arbitration Act and instead advocated for a special domestic arbitration law in Nigeria. Also like Ghana, we incorporated customary arbitration into our suggested framework. However, unlike the Ghanaian ADR Act, which has two different parts for arbitration and customary arbitration, we opine and show the reader that there is no justification for this distinction. In our framework therefore, domestic arbitration is redefined to include customary arbitration.

The result of all these is a specially tailored arbitration law, that takes into consideration the legal and social idiosyncrasies of Nigeria as well as established and proven arbitration principles practised in other jurisdictions. We strongly believe that this framework when adopted will promote the development of domestic arbitration in Nigeria and by implication provide a viable alternative to the ailing litigation practice in Nigeria.

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